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

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98

and **Case 04-CC-229379**

POST GENERAL CONTRACTING, LLC D/B/A POST BROTHERS

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE CHIEF ADMINISTRATIVE LAW JUDGE'S DECISION

Respectfully submitted,

Dated: June 3, 2020

/s/ *Jun S. Bang*

JUN S. BANG
Counsel for the General Counsel
National Labor Relations Board
Fourth Region
The Wanamaker Building
100 Penn Square East, Suite 403
Philadelphia, Pennsylvania 19107

TABLE OF CONTENTS

I. INTRODUCTION 1

II. PROCEDURAL HISTORY 1

III. STATEMENT OF FACTS 2

A. Background 2

B. On September 17, 2018 Respondent Broadcasted a Recording of a Crying Baby at the Atlantic Building 3

C. On September 18, 2018, Respondent Broadcasted a Recording of the Crying Baby and Respondent's Agent Impliedly Threatened to Set Fire to the Property of Post Brothers Representative Patrick Steffa 5

D. On September 19, 2018 and Continuing Through October 19, 2018, Respondent Continued to Broadcast a Recording of the Crying Baby 7

E. The Piercing Noise of the Crying Baby Invaded Residents in Their Homes, Forced Them to Leave Their Apartments During the Day, Woke Up Residents and Evoked Numerous Complaints to City Council. 8

F. The Recording of the Crying Baby Evoked Complaints From Pedestrians and Businesses, Traveled Underneath Broad Street Into the Underground Subway, Forced Post Brothers to Alter How Deliveries Were Received, and Forced Post Brothers to Relocate Subcontractors Working Inside the Atlantic Building. 11

V. LEGAL ANALYSIS 15

A. Applicability of Section 8(b)(4)(ii)(B) Law 15

B. In the Sphere of Labor Relations, the Government Has a Substantial Interest in Justifying Some Restraints on First Amendment Freedoms 17

C. The Board's Decisions in Eliason & Knuth and Brandon Medical Center (Brandon II) Were Wrongly Decided and Should be Overruled 19

D. The ALJ Wrongly Concluded that Respondent's Use of an Amplified Recording of a Crying Baby was Not Picketing and Did Not Violate Section 8(b)(4)(ii)(B) (Exceptions 1, 2, 3, 4 and 5) 23

E. First Amendment Concerns Are Not Implicated 28

VI. CONCLUSION AND REMEDY 32

APPENDIX A 33

TABLE OF CASES

Carpenters Kentucky District Council (Wehr Constructors),
308 NLRB 1129 (1992)..... 21
Carpenters Local 1506 (Eliason & Knuth of Arizona),
355 NLRB 797 (2010)..... 16, 19, 20, 22, 23, 24, 25, 26, 27
Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, (DeBartolo II), 485 U.S. 568 (1988)..... 15, 16, 18, 20, 21, 26, 28, 29, 31
International Bhd. of Elec. Workers, Local 501 v. NLRB,
341 U.S. 694 (1951)..... 17, 28
International Longshoremen's Association v. Allied International,
456 U.S. 212 (1982)..... 29, 31
Iron Workers Pacific Northwest Council (Hoffman Construction),
292 NLRB 562 (1989)..... 20
Klein v. City of Laguna Beach,
594 F. Supp. 2d 1142 (C.D. Cal. 2009)..... 30
Kovacs v. Cooper,
336 U.S. 77 (1949)..... 29, 30
Laborers Local 389 (Calcon Const.),
287 NLRB 570 (1987)..... 16
Lawrence Typographical Union 570 (Kansas Color Press),
169 NLRB 279 (1968)..... 16, 19, 25
Lumber & Sawmill Workers Local Union No. 2792 (Stoltze Land & Lumber),
156 NLRB 388 (1965)..... 16, 19, 25
Metropolitan Regional Council, Carpenters (Society Hill Towers),
335 NLRB 814, (2001)..... 17, 20, 21, 30, 31
Mine Workers (New Beckley Mining),
304 NLRB 71 (1991)..... 17
Mine Workers District 2 (Jeddo Coal Co.),
334 NLRB 677 (2001)..... 15, 20, 21, 25
NLRB v. Denver Building and Construction Trades Council,
341 U.S. 675 (1951)..... 15
NLRB v. Fruit Packers (Tree Fruits),
377 U.S. 58 (19641)..... 15
NLRB v. Operating Engineers Local 825 (Burns & Roe, Inc.),
400 U.S. 297 (1971)..... 15
NLRB v. Retail Clerks Local 1001(Safeco Title Ins. Co.),
447 U.S. 607 (1980)..... 15, 18, 21, 28
NLRB v. Teamsters Local 182 (Woodward Motors),
314 F.2d 53 (2d Cir. 1963)..... 16
NLRB v. United Furniture Workers,
337 F.2d 936 (2d Cir. 1964)..... 20
Painters District Council 9 (We're Associates),
329 NLRB 140 (1999)..... 16
Pine v. City of W. Palm Beach, FL,
762 F.3d 1262 (11th Cir. 2014)..... 30

Radio-TV Service Technicians, Local 202,
132 NLRB 1049 (1969) 24
Service Employees Local, 87 (Trinity Maintenance),
312 NLRB 715 (1993) 16, 17, 21, 25, 29
Service Employees Local 399 (William J. Burns Agency),
136 NLRB 431 (1962)..... 17
Service Employees Local 525 (*General Maintenance Co*.),
329 NLRB 638 (1999)..... 17, 29
Sheet Metal Workers Local 15 (Brandon Medical Center),
(Brandon II), 356 NLRB 1290 (2011) 19, 22, 23, 24, 26, 28
Sheet Metal Workers Local 15 (Brandon Medical Center),
(Brandon I), 346 NLRB 199 (2000) 22
Sheet Metal Workers Local 48 (Hardy Corp.),
332 F.2d 682 (5th Cir. 1964)..... 21
United Brotherhood of Carpenters and Joiners of America v. Sperry,
170 F.2d 863 (10th Cir. 1948)..... 18, 29
Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,
425 U.S. 748 fn. 17 (1976)..... 17, 18, 22

Statutes

29 U.S.C. § 158 (b)(4)(ii)(B) 15, 18

I. INTRODUCTION

Chief Administrative Law Judge Robert A. Giannasi issued his decision in this case on May 6, 2020. Although he correctly found that playing an amplified recording of a crying baby at excessively high levels in front of the Broad Street site (also known as the Atlantic Building) by IBEW Local Union 98 **(**Respondent**)** on various dates between September 17, 2018 through October 19, 2018 constituted unlawful secondary coercion[1]**,** he concluded that this conduct was not picketing in violation of Section 8(b)(4)(ii)(B) of the Act. This case is not about handbilling to convey an area standards message. At its core, it is about confrontational conduct that is tantamount to secondary picketing. General Counsel asserts that Respondent's use of an amplified speaker to broadcast a recording of a crying baby at an excessively high volume is tantamount to secondary picketing in violation of the National Labor Relations Act (the Act). By engaging in the essentially undisputed conduct, Respondent engaged in unlawful secondary picketing in violation of Section 8(b)(4)(ii)(B) of the Act.

Accordingly, Counsel for the General Counsel takes exception to various findings, conclusions, and remedy in the Judge's Decision that the conduct was not tantamount to picketing.

II. PROCEDURAL HISTORY

Charging Party Post General Contracting d/b/a Post Brothers (Post Brothers) filed the charge in Case 04-CC-229379 on October 17, 2018. (GCX-1(a))[2] On October 22, 2019, Dennis

---

[1] The Judge also correctly found that Respondent violated Section 8(b)(4)(ii)(B) when Respondent's Agent Brian Eddis impliedly threatened to set fire to the property of a Post Brothers Representative.

[2] Throughout this brief, abbreviated references are employed as follows: "ALJD" followed by page and line numbers to designate the ALJ's Decision; "T" followed by page number to designate Transcript pages; "GCX" followed by exhibit number to designate General Counsel's Exhibits; "RX" followed by exhibit number to designate Respondent's Exhibits; "JT" followed by exhibit number to designate Joint Exhibits.

P. Walsh, Regional Director of Region 4, issued a Complaint and Notice of Hearing alleging that Respondent had engaged in conduct that violated Section 8(b)(4)(ii)(B) of the Act. (GCX-1(c)-(d)) On October 31, 2019, Respondent filed an Answer to the Complaint. (GCX-1(e)) On December 12, 2019, Dennis P. Walsh, Regional Director of Region 4, issued an Order Rescheduling Hearing from January 7, 2020 to February 25, 2020. (GCX-1(f)-(g)) Chief Administrative Law Judge Robert Giannasi held the hearing in this case in Philadelphia, Pennsylvania on February 25 and 26, 2020.

III. STATEMENT OF FACTS

A. Background

Post Brothers is a general contractor that has been renovating the Atlantic Building, located at 260 South Broad Street (Broad Street site or the Atlantic Building) on the northwest corner of Broad and Spruce Streets in Philadelphia, Pennsylvania, into residential apartments with a commercial space on the ground floor. The 23-story Atlantic Building is located in a mixed-use area of Center City, Philadelphia, with both residential and commercial activity. (ALJD 2:23-30) There are four performing arts centers near the Atlantic Building, with the Merriam Theatre located next door on the other side of Bach Place, the Academy of Music located next to the Merriam Theatre on the corner of Broad and Locust Streets, the Wilma Theatre located directly across the street on the other side of Broad Street, and the Kimmel Center located on the other side of Spruce Street. (ALJD 2:30-31; GCX-12) There are several commercial businesses located on Broad Street, including the Wilma Café (housed in the Wilma Theatre), the Double Tree Hotel (located across the street at the corner of Broad and Locust Streets), and Ride Aid Pharmacy and Wawa (located on Broad Street going North to the intersection with Walnut Street). (GCX-12) Center City One Condominiums (Center City One) is a 30 story residential condominium located on the

other side of Broad Street, next to a vacant lot and a half block East on the corner of South Juniper and Spruce Streets. Spruce Street is a one way street traveling west, one lane for cars and one lane for parking. (ALJD 2:30-35) Center City One is located on a quiet residential street off of Broad Street. (T. 160)

During the renovation, Major Electric, a non-union electrical subcontractor, and other contractors were working at the Broad Street site. (ALJD 3:1-5; JT-1, No. 11) From September 17, 2018 through October 19, 2018, for an undetermined number of weekdays, Respondent engaged in protest against the use of Major Electric at the Broad Street Site. (ALJD 2: 36-38)

B. On September 17, 2018 Respondent Broadcasted a Recording of a Crying Baby at the Atlantic Building

For a period of time before September 17, 2018, Respondent and other local unions took turns displaying an inflatable rat and a sign or placard in front of the Atlantic Building during Post Brothers renovation of the building. (T. 82-83) However, on September 17, 2018, Respondent changed tactics when Business Representative John Donohoe arrived at the Atlantic Building in the afternoon to set up equipment that amplified a recording of a crying baby. (T. 237) Donohoe then left and Brian Eddis, Respondent's Business Agent, and two other Business Agents with Respondent remained with the equipment and distributed handbills. (T. 237). On September 17, 2018, the recording device "was set at a high volume" at volume number "7." (ALJD 3:3-33; T. 238) During that time, there were a substantial number of subcontractors working inside the Atlantic Building. (ALJD 3: 2-5; T. 237) The recording device was amplified through two speakers and played a crying baby on a loop that lasted for over 30 seconds, interrupted by a 6 second voice message, followed by the crying baby again. The recorded voice message stated: "Your community is crying for jobs, participation, and fair wages." The amplified recording played at high volume and continuously for about 4 to 6 hours a day. (ALJD 3:15-29; JT-1, No. 5; GCX-

3(a); GCX-8(a); T. 84-89) There is no mention of Respondent's primary dispute with Major Electric in the recorded message. (ALJD 12:23-26) Residents who heard the crying baby in their apartments could not hear any verbal message. (ALJD 5:2-3; T. 40, 65, 155) When the recording of the crying baby was being broadcasted, no other union other than Respondent was engaged in any other form of protest outside the Atlantic Building. (ALJD 2, fn. 3; T. 60) At the time of the crying baby recording, no other forms of labor protest such as the inflatable rat were displayed outside the Atlantic Building. (T. 59)

Respondent's agents distributed one flyer while broadcasting the recording of the crying baby from September 17, 2018 through October 19, 2018. (JT-1, No. 5)

The flyer states:

The Post Brothers?
more like
The Gross Brothers…
These brothers have polluted our community
ONCE AGAIN by hiring
Major Electrical Systems
to perform work at
<u>260 South Broad Street</u>.
Major Electrical Systems
REFUSES to play employees a **<u>wage and benefit</u>**
package that is recognized in this area as being
FAIR
The Post Brothers and Major Electrical Systems
VIOLATE this community.
If you are interested in keeping this community
Pristine…
Contact:
Mike Pestronk of The Post Brothers at 215-701-6535
in order to let him know that you **DON'T WANT**
Major Electrical Systems
to pollute the community.

(ALJD 3:6-10; GCX-7) On September 17, 2018, Eddis and Respondent's other agents remained in front of the Atlantic Building for a few hours until officers with the Philadelphia Police

Department, not the Civil Affairs Division, showed up and asked them to turn off the equipment and to leave. (T. 242) All three agents of Respondent complied and left around 4:00 p.m. that day. (T. 242) There is no report that Air Management conducted any tests on September 17, 2018. (ALJD 9:15-16)

C. On September 18, 2018, Respondent Broadcasted a Recording of the Crying Baby and Respondent's Agent Impliedly Threatened to Set Fire to the Property of Post Brothers Representative Patrick Steffa

On or about September 18, 2018, John Donohoe arrived with Brian Eddis and four other members affiliated with Respondent. (T. 83-84, 87) Respondent again set up its recording equipment, consisting of a receiver sitting on top of tote, connected to two white speakers and a generator. (T. 84); (GCX-8(a)) The speakers were primarily directed towards the front entrance to the Atlantic Building. (ALJD 3:15-18; T. 85). Respondent's arrival time varied each day, but Respondent would remain onsite blasting the crying baby for four to six hours, and Respondent's conduct continued for consecutive days, Monday through Friday from September 17, 2018 through October 19, 2018[3]. (ALJD 2:36-37, 3:26-27; T. 87-88) On September 18, 2018, Patrick Steffa, Executive Protection Director for Post Brothers, contacted Civil Affairs, a division of the Philadelphia Police Dept. and Air Management, a department with the City of Philadelphia that handles noise violations. (ALJD 6:1-5) Civil Affairs arrived first followed by Gary Everly, an Air Management Representative. (ALJD 6:4-5; T. 89, 91). Steffa asked Everly if he would agree that the noise was out of compliance. Everly responded, "I'll say that, yes." (ALJD 6:9-12; GCX-3(a)

[3] Patrick Steffa, Brandon Byrd and residents testified that they heard the crying baby for days lasting several weeks. (T. 51, 65, 136, 173) Judge Giannasi cited GCX-6(a)-(h) to explain that Respondent was present on six days according to the Daily Log-In Sheets. (ALJD 3, fn. 4) However, Respondent was present on eight, not six, days pursuant to the Daily Log-in Sheets: September 18, 19, 20, 21 and 24 and October 3, 16 and 18. GCX-6(a)-(h) In addition to these days, the record evidence established that Respondent was also present on other days including September 17, 2018, October 18, 2018 and October 19, 2018. (T. 236; JT. 1, No. 7)

and (b)) Steffa questioned Everly why he was refusing to enforce the City's ordinance when the noise decibels were 20 above the limit. (GCX-3(a))[4]; T. 95) Everly responded, "because I want them to be able to protest." (ALJD 6:9-12; GCX-3(a) and 3(b)) As Steffa continued to observe Everly, he noticed that Everly's equipment was not reading past 80. (ALJD 6:12-14; T. 104) When Steffa asked him about the number, Everly flipped a switch on his hand held decibel meter, and the decibel reading immediately jumped to 94. (T. 104) To document the higher number after Everly flipped the switch, Steffa used his cell phone to capture a picture of Everly's meter; Everly's meter showed 93.7. (ALJD 6:14-17; T. 104-105; GCX-15)

Before Air Management arrived on or about September 18, 2018, Patrick Steffa had a face to face conversation with Brian Eddis that began as a friendly conversation but got more heated. (T. 109) Eddis asked Steffa whatever happened to him. (T. 109) Before his employment with Post Brothers, Steffa had been a member of the Local 252 Glaziers Union. (T. 109, 112) Eddis followed up by telling Steffa "that he knew where Bridesburg was that fires happen all the time." (ALJD 9:35-36; T. 109-110) Steffa does not reside in Bridesburg but owns a bar named Krick Wuder in Bridesburg, which is a neighborhood in Philadelphia. (T. 109, 123) It is well known that Steffa owns Krick Wuder. (T. 240-241) Steffa's bar/restaurant is located about 250 feet from another bar that burnt down to the ground in December of 2017. (ALJD 9: 37-38; T 110) Both Brian Eddis and John Donohoe knew the location of Steffa's bar, especially since John Donohoe has frequented the bar. (ALJD 9:38-39; T. 110, 124, 240)

In light of Eddis' statement to Steffa, he felt threatened that his bar was in danger. (ALJD 9:39-41; T. 110-111) Steffa took this threat seriously and increased security at his bar by installing cameras after Eddis' statement. (ALJD 9:40; T. 128) That same day, Brian Eddis later told Steffa,

[4] All video evidence can be seen by accessing the link provided with the exhibit.

"that if Major Electric left that the crying baby would leave too." (ALJD 10:1; T. 111) This is an unrebutted admission, since Eddis did not deny making this statement during his testimony, nor did he refute Steffa's statement about the fire near Steffa's bar. (ALJD 10:9-11)

D. On September 19, 2018 and Continuing Through October 19, 2018, Respondent Continued to Broadcast a Recording of the Crying Baby

The next day, on or about September 19, 2018, John Donohoe, Brian Eddis and several other members affiliated with Respondent arrived, set up the same recording equipment and broadcasted the recording of a crying baby again. (T. 113) Steffa contacted Civil Affairs and Air Management. (T. 113) Everly arrived with his supervisor. (T. 113) Everly informed Steffa that he would not be writing a citation from the day before. Steffa believed that a citation would be issued for the previous day based on his conversation with Everly. (ALJD 6:18-20;T. 115) The video in GCX-3(a) and the accompanying transcript in GXC-3(b) corroborate Steffa's testimony that Everly agreed that the noise was out of compliance. (ALJD 6:20-23) However, no citation was issued for September 18, 2018 or September 19, 2018. (T. 116-117)

The next day, on or about September 20, 2018, Respondent show up again with their recording equipment. However, only Civil Affairs showed up. (T. 118) When Steffa called Air Management, he was informed that they would no longer come to the job site without providing an explanation. (T. 118-119) Air Management did not perform any additional readings other than the two days on September 18, 2018 and September 19, 2018. (ALJD 8:28-30, fn. 7) While Respondent was onsite, Steffa had a conversation with John Donohue. Donohue told Steffa, "if Major Electric went away, the screaming baby went away." (T. 119)

E. The Piercing Noise of the Crying Baby Invaded Residents in Their Homes, Forced Them to Leave Their Apartments During the Day, Woke Up Residents and Evoked Numerous Complaints to City Council.

General Counsel presented four residents from Center City One Condominiums who heard the screaming baby inside their apartments located on both the North and South side of the building, on floors ranging from the 9th floor all the way up to the 25th floor. (T. 39, 63, 136, 155) Pamela Bona testified that she heard a "horrible blasting of a baby crying" from her North facing apartment all the way up on the 23rd floor. (ALJD 5:1-2[5];T. 31, 35) At the hearing, Bona physically cringed in pain covering her ears when she was asked to identify whether the noise in GCX-4(a) was the same noise that she heard from inside her apartment. (T. 35) She and the other residents had to keep their windows and balcony doors closed because of the incessant noise even though they would have normally kept them open to enjoy the nice Fall weather. (ALJD 4:37-39; T. 39-40, 63, 137, 158). Pam Bona and Adam Klein had newer efficient, double pane windows installed prior to September 17, 2018, but they could still hear the crying baby "blasting" into their apartments. (ALJD 4:37-39; T. 38-39, 63). Adam Klein, a resident on the 25th floor, described the crying baby as a "constant barrage within my one home" that was loud and disturbing. (ALJD 5:13-15; T. 63-54). To drown out the "screeching" noise, Klein was forced to turn his music or television all the up, or he had to leave his apartment. (ALJD 5: 19; T. 64-65) Howard Paull, an 11th floor resident, heard a "very, very loud piercing recording on a loop of a crying baby" that started in late morning or afternoon and lasted all day. (ALJD 5:24-25; T. 136) Pamela Bona, Howard Paull and Adam Klein resided in apartments on the North side facing the Atlantic Building. Maria Vickers' apartment, however, faced the South side of Broad Street, which is completely on the other side Center City One with no view of the Atlantic Building, and she could

[5] Judge Giannasi noted that Pamela Bona lived on the 22nd floor, but Bona lived on the 23rd floor. (ALJD 5:1; T. 31)

still clearly hear the "screeching noise" of the crying baby inside her apartment. (ALJD 5: 38-41; T. 155)

Howard Paull and Maria Vickers testified how the crying baby disrupted their ability to work from home. (T. 138, 156) Vickers would hear the crying baby while she was working from home even with the windows closed. (T. 156) As a tour guide, Paull's job involved talking on the phone to confirm and organize tours, but he couldn't even have a phone conversation. (T. 138) Paull testified that it "was like torture" because he couldn't "concentrate" and callers on the phone who heard the crying baby would ask him what that noise was. (ALJD 5:27-28; T. 138) Paull was forced to leave his residence at least half a dozen times to work at other locations like a "coffee shop" to avoid hearing the crying baby. (ALJD 5:30-31; T. 139-140) Normally, Paull would go to the Wilma Café, which was his "go-to" café to work. (T. 139). However, Paull had to leave the Wilma Café because he could still clearly hear the crying baby inside the cafe[6]. (T. 139) If Paull arrived home late from work the night before, he would normally sleep until late morning, but he was woken up several times by the crying baby. (T.138) According to Paull, the sound of the crying baby was torture, was "so offensive, so horrible." (T. 140) Howard Paull also testified that when he spoke with Union Representative John Donohoe about how the crying baby was "disrupting the neighborhood," Donohoe became "really aggressive and combative" to the point that they had to be separated by Civil Affairs officers. (T. 148)

As Center City residents, Bona and the other residents routinely walked around their neighborhood to shop, work, etc. Bona could hear the crying baby walking one block North on Broad Street towards the Doubletree Hotel and even past Locust Street, one block West of the

[6] The Wilma Café is housed in the Wilma Theatre located directly across the street from the Atlantic Building, across six traffic lanes on Broad Street.

Atlantic Building towards 15th and Spruce, and one and a half block East towards 13th and Spruce Street. (ALJD 5:6-8; T. 52-53) Maria Vickers also could hear the crying baby while walking around her neighborhood, including as far North as Broad and Locust Streets and beyond. (T. 156-157)

None of the residents could hear any recorded message inside their apartments, only the disturbing crying baby. (ALJD 12:23-26; T. 40, 64, 155) Residents like Bona testified that you could not ignore the crying baby because it was "very distressing." (T. 56) More significantly, the residents could hear the crying baby inside their apartments above any normal traffic noise. (T. 58-59) As Bona explained, "There was no way not to hear it." (T. 59) Klein testified that he could "absolutely" hear the crying baby even with any Broad Street traffic. (ALJD 5:17-18; T. 65) Although Maria Vickers testified that the noise generally caught her attention, she was more disturbed in an "emotionally painful way" by "the underlying sound of the crying baby." (T. 160) Vickers further testified on cross-examination that the noise may have caused her to investigate the source, but she told the Union Representatives that the noise was not making them any friends even among those who were very sympathetic to their cause. (ALJD 5:41-43; T. 161-162)

The distressing nature of the crying baby did not encourage residents to walk to the Atlantic Building for a flyer but forced them to take action against Respondent. They contacted the police, but when that did not solve the problem, they contacted the Mayor's Office and City Council. (ALJD 4:39-41; T. 40-41) Adam Klein was President of the Condominium Association when the Union was broadcasting the crying baby in 2018. (T. 62). After learning that more than 25-30 residents were complaining to the front desk that they could hear the crying baby, Klein felt compelled to act. (T. 68) On Tuesday, October 16, 2018, he emailed Council Member Mark Squilla, who represents the district where Center City One is located, about the union using a

"recording of a screaming baby" that has been ongoing for a month. (GCX. 17) Klein further stated that he could hear the screaming baby as he was writing the email around 5:49 p.m. Id. Councilman Mark Squilla responded that he would call the police to enforce this behavior. Id. When the screaming baby continued, Adam Klein wrote another email to Councilman Mark Squilla on October 19, 2018 informing him that the noise continues each day, even as he was writing the email around 12:31 p.m. and that the front desk receives 25-30 complaints daily. Id.

In addition to Klein, Howard Paull was also prompted to call Councilman Squilla's office at least six times. (T. 141) Pamela Bona called the police, but when the she heard the "blasting" of the crying baby again, she was prompted to contact the Mayor's Office and City Council. (ALJD 4:39-42; T. 40-43) On October 18, 2018, Pamela Bona emailed Philadelphia Mayor Jim Kenney and Philadelphia City Council Members Mark Squilla and Kenyatta Johnson about the recording that "starts blasting in the morning and runs through the afternoon, every day that construction at The Atlantic Building is going on." (GCX. 14) Councilman Squilla responded to Bona's email on October 19, 2018 indicating that he would reach out to the authorities to resolve this issue. Id. After Bona's October 18, 2018 email and Klein's last email on October 19, 2018 to Councilman Squilla, Respondent stopped blasting the recording of the crying baby after October 19, 2018. (ALJD 5:10-11; GCX-14)

F. The Recording of the Crying Baby Evoked Complaints From Pedestrians and Businesses, Traveled Underneath Broad Street Into the Underground Subway, Forced Post Brothers to Alter How Deliveries Were Received, and Forced Post Brothers to Relocate Subcontractors Working Inside the Atlantic Building.

Post Brothers Representatives had to field complaints from neighboring businesses about the crying baby noise. Patrick Steffa received complaints from the manager at the Wilma Café about how the crying baby could be heard inside his café and that his customers were leaving. (T.

112-113). This testimony was corroborated by Howard Paull who heard the crying baby inside the Wilma Café and was forced to leave because of the noise. (T. 139) Vitali Vasilevich was also notified by concerned stage workers working in the Merriam Theatre next door to the Atlantic Building because they heard a crying baby. (T. 202)

Steffa heard the crying baby inside the Atlantic building from the fifth floor bathroom and that the loudness even made it difficult for him to communicate on the radio that controlled the buck hoist. (ALJD 4:7-98; T. 120-121) A buck hoist is a lift or elevator for personnel and materials at the construction site. (T. 121) Radios are located on each floor, and construction workers use radios to call the operator to move the buck hoist up or down. (T. 121). The crying baby was so loud that Steffa could not hear the communications on the radio. (T. 121). Vitali Vasilevich also heard the crying baby inside the building on the ground floor behind closed double doors and on the upper floors where numerous trades were working. (T. 201)

Security Officer Brandon Byrd personally witnessed interactions between pedestrians and Respondent's agent when the crying baby was being broadcasted. On October 17, 2018, he saw an elderly couple tell John Donohoe how "ridiculous" and "annoying" the crying baby was while refusing to take a flier. (GCX-5; T. 169) Byrd testified that he had seen the same couple on multiple occasions walking by the Atlantic Building. (T. 170) On October 17, 2018, Byrd also witnessed an elderly resident in a baseball cap complain to John Donohoe that he could hear the crying baby all the way to his residence. (ALJD 3:39-40 and 4:1-2; GCX-4(a) and 4(b)); T. 173) This was another pedestrian who walked by the Atlantic Building on a daily basis. (T. 173) The resident informs Donohoe that he lives in the neighborhood and he's "pro union" but this does not help their cause. (GCX-4(a) and 4(b)) Donohue argues with the pedestrian telling him "you can't hear it across the street" or "that it stops the moment you go across the street," but the resident

emphatically tells him, “you can” and “come with me I’ll take you to me apartment” (GCX 4(a) and 4(b)) Donohoe is visibly smiling, almost laughing in the video, not taking the resident’s complaint seriously. Donohoe’s smug reaction in the video supports Byrd’s testimony that he witnessed Donohoe raising the volume of the crying baby after receiving pedestrian complaints to show them how much louder the crying baby could be. (T. 175-176) Byrd witnessed Donohoe raising and lowering the volume every other day for a few seconds in response to pedestrian complaints while making the comment, “now that’s loud.” (T. 175)

Byrd, who is posted outside the Atlantic Building on a daily basis, has witnessed pedestrians covering or plugging their ears, similar to the pedestrian photographed in GCX-9. (ALJD 4:14-17) Byrd testified that he could hear the crying baby from the moment he walked down the subway steps at Broad and Spruce Streets and walked underground underneath Broad Street until he reached Locust Street where he caught his train every day. (ALJD 4:17-19; T. 178, 180; GCX-13)

Post Brothers was forced to make several changes to its business operations because of the crying baby. Post Brothers had to issue ear plugs to its security guards. (ALJD 4:11-13; T. 181) Byrd testified that he had headaches after standing and listening to the crying baby for hours. (T. 181) Post Brothers had to relocate contractors working inside the Atlantic Building to other locations to avoid hearing the relentless crying. (ALJD 4:30-32; T. 199) Vitali Vasilevich heard the crying baby while working on the upper floors inside the building, especially on floors where windows had been completely removed; at that time, floors 4-11 had windows removed on the entire floor. (T. 191, 198-199; GCX-18) Contractors working on various floors heard the crying baby and confronted Vasilevich fearing that a baby was in distress. (T. 199) When they learned that it was a recording, contractors felt uncomfortable working with the constant noise of the crying

baby and asked to be relocated. (T. 199) As a result, Post Brothers had to readjust the work site of the contractors in response to their complaints about the noise. (ALJD 4:30-32; T. 200)

Deliveries were another obstacle Post Brothers had to overcome because of the crying baby. Post Brothers had difficulty communicating with drivers for deliveries forcing them to change the way deliveries were received. (ALJD 4: 22-24; T. 197) Vitali Vasilevich received three major and four small deliveries per day. (ALJD 4:25-26; T. 193). Before Respondent blasted the crying baby, Vasilevich provided "quick" and "easy" instructions to drivers by cell phone regarding how trucks could enter Bach Place for deliveries. (T. 195) However, the loud noise of the crying baby made communicating by cell phone "pretty much impossible because the noise was so overbearing that the driver wouldn't be able to hear or follow any of his instructions." (ALJD 4:26-28; T. 194) Vasilevich resorted to using hand gestures to instruct drivers when to back in, stop, etc. (ALJD 4:28-30; T. 194). Post Brothers also did not receive certain deliveries when the crying baby was being broadcasted. (T. 195-196). Vasilevich testified that he was notified by either a dispatcher or driver explaining that the driver was part of a union and would not cross a picket line. (T. 195) Vasilevich testified that this occurred when the crying baby was being broadcasted. (T. 196) Vasilevich also testified that a specific drywall delivery was not made when the crying baby was broadcasted and had to be rescheduled off hours or on the weekend when the crying baby was not present. (T. 205) It is undisputed that Respondent was the only labor union engaging in a labor protest when the crying baby was being broadcasted. (See Stipulations in T. 60). It is also undisputed that there were no other forms of labor protests such as an inflatable rat being displayed when the crying baby was being broadcasted. (T. 59) Therefore, seeing Respondent's agents in front of the Atlantic Building handing out fliers and broadcasting a crying

baby was the only "picket line" present when drivers refused to make the deliveries on these occasions.

V. LEGAL ANALYSIS

A. Applicability of Section 8(b)(4)(ii)(B) Law

Section 8(b)(4)(ii)(B) of the Act makes it "'an unfair labor practice for a labor organization … to threaten, coerce, or restrain' a person not party to a labor dispute 'where … an object thereof is … forcing or requiring [him] to … cease doing business with any other person.'" *NLRB v. Retail Clerks Local 1001 (Safeco Title Ins. Co.)*, 447 U.S. 607, 611 (1980) (quoting 29 U.S.C. § 158 (b)(4)(ii)(B)). Concern over unions pressuring neutral, secondary employers prompted Section 8(b)(4)(B), which is meant to simultaneously protect unions' right to exert legitimate pressure on employers with whom they have a primary labor dispute, and to shield neutral businesses from labor disputes not their own. *NLRB v. Operating Engineers Local 825 (Burns & Roe, Inc.)*, 400 U.S. 297, 302-303 (1971); *see also NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 692 (1951). In determining what exactly constitutes unlawful "threat[s], coerc[ion], or restrain[t]" under Section 8(b)(4)(ii)(B), the Supreme Court has determined that while handbilling at a neutral employer's business is lawful, picketing urging a boycott of the neutral employer is coercive and therefore unlawful.[7] *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council (DeBartolo II)*, 485 U.S. 568, 579-80 (1988) (citing *Safeco*, 447 U.S. at 607). That is because, the Court explained, "picketing is a mixture of conduct and communication and the conduct element often provides the most persuasive deterrent to third

[7]The Court has held, however, that secondary picketing solely urging consumers to boycott specific products produced by an employer with whom the union has a primary labor dispute and distributed by the secondary employer, is lawful. *NLRB v. Fruit Packers (Tree Fruits)*, 377 U.S. 58 (1964).

persons about to enter a business establishment." Id. at 580 (internal citations and quotation marks omitted). Handbilling, by contrast, relies solely on the persuasive force of the idea within the handbill, rather than the confrontational element inherent in picketing. Id.

The Board and courts have historically defined picketing in a very broad and flexible manner.[8] *See Lumber & Sawmill Workers Local Union No. 2792 (Stoltze Land & Lumber)*, 156 NLRB 388, 394 (1965); *Mine Workers District 2 (Jeddo Coal Co.)*, 334 NLRB 677, 686 (2001); *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 743 (1993), enfd. 103 F.3d 139 (9th Cir. 1996); *Lawrence Typographical Union 570 (Kansas Color Press)*, 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1968). Patrolling and the carrying of picket signs have never been prerequisites to establish picketing. *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797, 814-15 (2010) (citing, *inter alia*, *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB at 743, 746); *Cf. DeBartolo II*, 485 U.S. at 571 ("the union peacefully distributed the handbills without any accompanying picketing *or patrolling*") (emphasis added).

The Board and courts have found a variety of conduct to be picketing or tantamount to picketing, including planting signs in a snowbank and then watching the signs from a parked car, *NLRB v. Teamsters Local 182 (Woodward Motors)*, 314 F.2d 53 (2d Cir. 1963), enfd. 135 NLRB 851 (1962); and posting stationary agents with signs near an employer's entrance, *Jeddo Coal Co.*, 334 NLRB at 686). *See also Laborers Local 389 (Calcon Const.)*, 287 NLRB 570, 573 (1987) (union agents standing near stationary sign or sitting in parked van with sign on outside of van, constitutes picketing); *Painters District Council 9 (We're Associates)*, 329 NLRB 140, 142 (1999) ("where groups of men are gathered around a sign … they are engaged in picketing") (internal

[8] *See also Eliason & Knuth*, 355 NLRB at 815(Members Schaumber and Hayes, dissenting).

citations omitted); disorderly conduct in front of a neutral's business, including attaching a banner to the neutral's building, *Trinity Maintenance*, 312 NLRB at 746; and the mass gathering of strikers and community members without picket signs or placards in a neutral hotel's parking lot where strikebreakers were staying, *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 72 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992).

Other conduct that the Board has found was not picketing but nevertheless coercive within the meaning of Section 8(b)(4)(ii)(B) includes broadcasting a message at extremely high volume through loudspeakers facing a neutral condominium building, *Metropolitan Regional Council, Carpenters (Society Hill Towers Owners' Assn.)*, 335 NLRB 814, 820-23 (2001), enfd. 50 F. App'x 88 (3d Cir. 2002); throwing bags full of trash into a building's lobby, *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB 638, 664-65, 680 (1999), enfd. 52 F. App'x 357 (9th Cir. 2002); and 20-70 union members marching in an elliptical pattern without signs while some distributed handbills, *Service Employees Local 399 (William J. Burns Agency)*, 136 NLRB 431, 436-37 (1962).[9] In the latter case, the Board noted that the union's conduct had "overstepped the bounds of propriety and went beyond persuasion so that it became coercive to a very substantial degree." Id.

B. In the Sphere of Labor Relations, the Government Has a Substantial Interest in Justifying Some Restraints on First Amendment Freedoms

The Supreme Court has long recognized that in the "special context of labor disputes," speech is "subject to a number of restrictions." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 fn. 17 (1976). In Section 8(b)(4), Congress sought to prohibit the "substantive evil" of the secondary boycott, and the Supreme Court has recognized

[9] Two members of the Board majority would, in fact, have labeled the union's conduct "picketing." Id. at 437.

that the First Amendment does not shield conduct that falls afoul of that prohibition. *International Brotherhood of Electrical Workers, Local 501 v. NLRB*, 341 U.S. 694, 705 (1951) (secondary picketing, as well as phone call emphasizing the purpose of the picketing, not protected by the First Amendment); see also *Safeco*, 447 U.S. at 616 ("[a]s applied to picketing that predictably encourages consumers to boycott a secondary business, § 8(b)(4)(ii)(B) imposes no impermissible restrictions upon constitutionally protected speech").

As the Tenth Circuit has observed, "[t]he constitutional right of free speech and free press postulates the authority of Congress to enact legislation reasonably adapted to the protection of interstate commerce against harmful encroachments arising out of secondary boycotts." *United Brotherhood of Carpenters and Joiners of America v. Sperry*, 170 F.2d 863, 869 (10th Cir. 1948) (placement of neutral employer on blacklist, promulgation of the blacklist, and picketing the neutral employer unprotected by the First Amendment).

In a similar vein, commercial speech is also entitled to less constitutional protection, especially where it does not implicate the public interest. *Virginia Citizens Consumer Council*, 425 U.S. at 762-64. In *DeBartolo II*, the Supreme Court declined to read Section 8(b)(4)(ii)(B) as prohibiting a union's handbilling that pressed the advantages of unionization to the public. *DeBartolo II*, 485 U.S. at 575-76. The Court also applied the canon of constitutional avoidance because a finding that a union's handbilling violated Section 8(B)(4)(ii)(B) would pose serious questions as to the constitutionality of that provision. Id. In so holding, the Court noted that the union's handbilling did not constitute commercial speech, inasmuch as the handbills did not "advertis[e] the price of a product or argu[e] its merits." Id. at 576. However, the Court did not analyze the parameters of commercial speech, and it acknowledged that if a union *did* engage in commercial speech, that speech would be entitled to lesser constitutional protection. Id.

C. The Board's Decisions in Eliason & Knuth and Brandon Medical Center (Brandon II) Were Wrongly Decided and Should be Overruled

As demonstrated above, under the Board's historical broad and flexible definition, Respondent's behavior at the Atlantic Building constitutes picketing. Respondent will rely on *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010), and *Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)*, 356 NLRB 1290 (2011), in defense of its actions. In those decisions, the Board narrowed its definition of picketing, and thereby the scope of unlawful activity prohibited by Section 8(b)(4), and determined that certain union conduct, including the deployment of an inflatable rat at neutral employers' facilities, was lawful nonpicketing secondary activity under the Act. However, the analysis in those cases were incorrect. The Board should overrule those cases and return to the legal standards that were previously in effect.

In *Eliason & Knuth*, the Board majority concluded that a union's posting of agents holding large, stationary banners proclaiming, "labor dispute" and "shame on [the employer]" in front of neutral businesses did not violate Section 8(b)(4)(ii)(B). In particular, the Board majority stated its view that stationary bannering is not tantamount to picketing. Thus, for the first time, the Board held that the "carrying of picket signs and persistent patrolling" were necessary predicates to establish picketing. Id. at 802. In doing so, the Board majority acknowledged prior case law that articulated a broader definition of picketing, i.e., the posting of union agents at a business entrance to keep away employees and/or customers. Id. at 803-804 (citing, e.g., *Stoltze Land & Lumber Co.*, 156 NLRB at 394 (posting union agents to confront customers and employees near employer's entrance was picketing); *Kansas Color Press*, 169 NLRB at 283 (strikers, who sat in their cars at entrance to employer's premises, and would confront members of public arriving at premises, were

engaged in picketing); *Iron Workers Pacific Northwest Council (Hoffman Construction)*, 292 NLRB 562 fn. 2 (1989), enfd. 913 F.2d 1470 (9th Cir. 1990) (groups of union agents gathered around a sign constitutes picketing); *Jeddo Coal*, 334 NLRB at 686 (union agents standing with picket signs without patrolling constitutes picketing). The Board majority attempted to reconcile that broader precedent by noting that in many of those cases, the display of stationary signs was preceded by union agents' ambulatory picketing, during which they often used traditional picket signs. *Eliason & Knuth*, 355 NLRB at 804. Moreover, the Board majority noted that many of those cases pre-dated the Supreme Court's decision in *DeBartolo II*, and stated that a definition of picketing that relied solely on the posting of a union agent near the entrance to an employer's place of business was incompatible with *DeBartolo II*'s holding that handbilling near an entrance was lawful. Id. at 803. In addition to concluding that the bannering was not equivalent to picketing, the *Eliason* Board determined that the bannering was not otherwise coercive within the meaning of Section 8(b)(4)(ii)(B) because, e.g., it did not block ingress or egress to neutral businesses or otherwise disrupt the neutral businesses' operation. Id. at 805-806 (citing *Society Hill Towers Owners' Assn.*, 335 NLRB at 820-23). Finally, applying the doctrine of constitutional avoidance, the Board determined that a finding that the bannering was unlawful would raise serious First Amendment issues, and so it declined to read Section 8(b)(4)(ii)(B) as proscribing the banner displays. Id. at 807-11.

However, dissenting Members Schaumber and Hayes would have found the bannering to be unlawful. Id. at 811-21. They argued that bannering was the "confrontational equivalent of picketing" that sought to induce the public to react with "emotions" and "fear of retaliation" rather than by appealing to the public's reason. Id. at 815 (citing *NLRB v. United Furniture Workers*, 337 F.2d 936, 940 (2d Cir. 1964)) They argued that Section 8(b)(4)(ii)(B) was meant to broadly shield

neutral, innocent employers from "nonjudicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing, or other economic retaliation or pressure in the background of a labor dispute." Id. at 813 (emphasis removed, internal quotation marks omitted) (citing *Carpenters Kentucky District Council (Wehr Constructors)*, 308 NLRB 1129, 1130 fn. 2 (1992) (quoting *Sheet Metal Workers Local 48 v. Hardy Corp.*, 332 F.2d 682, 686 (5th Cir. (1964)). The dissent pointed to the extensive body of law in which the Board and courts have defined labor picketing flexibly and broadly. Id. at 814-15. Moreover, the dissent explained, the sheer size of the banners obviated the need for traditional patrolling and created a physical, or at least a "symbolic[ally] confrontational barrier" to those seeking access to the neutral's premises. Id. Disagreeing with the majority's contention that an expanded definition of picketing was inconsistent with the Supreme Court's decision in *DeBartolo II*, the dissent noted that the Board had long adhered to an expanded definition of picketing, even in the wake of *DeBartolo II*. Id. at 817-18 & fn. 30 (citing *Trinity Maintenance*, 312 NLRB at 743; *Jeddo Coal Co.*, 334 NLRB at 686). The dissent argued that *DeBartolo*'s holding was limited to finding that *handbilling* at a neutral employer's facility was lawful, inasmuch as the success of handbilling turns solely on persuasion. Id. at 817-18. Because a banner, by contrast, contains much less speech than a handbill, and mimics the confrontational aspects of a picket line, its success depends on intimidation, rather than mere persuasion. Id. Finally, the dissenters disagreed with the majority's application of the doctrine of constitutional avoidance. They explained that, since the bannering was tantamount to picketing, no constitutional concerns were raised, as it is settled law that secondary picketing is not entitled to First Amendment protection. Id. at 820 (citing *Safeco*, 447 U.S. at 616). Moreover, even if secondary bannering were entitled to some First Amendment protection, the dissent noted that the government has a substantial interest in regulating labor

relations that justifies some restrictions on free speech. Id. at 820-21 (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 fn. 17 (1976)).

In 2011, the Board extended the holding of *Eliason & Knuth* to hold that a union's use of a large, inflatable rat was neither picketing, nor otherwise coercive. *Sheet Metal Workers Local 15 (Brandon Medical Center)* (*Brandon II*), 356 NLRB at 1292. In *Brandon II*,[10] the union had set up a large, inflatable rat on a truck approximately 100 feet from the neutral hospital's front door. Id., at 1290. The same three-member Board majority that issued the decision in *Eliason & Knuth* held in *Brandon II* that the union's large inflatable rat did not constitute picketing where the rat was located at a significant distance from the hospital entrance, and its attendants did not physically or verbally accost hospital patrons. The Board found that there was insufficient confrontation to render the conduct unlawful. Id. at 1292. Notably, the Board majority acknowledged that "the size of a symbolic display combined with its location and threatening or frightening features could render it coercive within the meaning of Section 8(b)(4)(ii)(B)." Id. at 1294.

Member Hayes dissented in *Brandon II*, as he had done in *Eliason & Knuth*, and, contrary to the *Brandon II* majority, would have expanded the definition of picketing to find that the union's use of an inflatable rat balloon, "a well known symbol of labor unrest," was tantamount to picketing. Id. at 1296. Member Hayes concluded that the message for "pedestrians or occupants of cars passing in the shadow of a rat balloon, which proclaims the presence of a 'rat employer,'"

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

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

It is submitted that *Eliason & Knuth* and *Brandon II*, restricting the definition of picketing to circumstances where union agents carry picket signs while patrolling, were wrongly decided, inappropriately departed from the Board's previously broad and flexible definition of picketing, and should be overruled. The dissenters in those cases had the better argument because the placement of union agents with large banners or inflatable rats at the entrances to neutral businesses sought to dissuade the public from entering through coercive conduct, rather than through a persuasive message, and therefore should have been considered tantamount to picketing under well-established law. *Eliason & Knuth*, 355 NLRB at 815-16; *Brandon II*, 356 NLRB at 1296-97.

D. The ALJ Wrongly Concluded that Respondent's Use of an Amplified Recording of a Crying Baby was Not Picketing and Did Not Violate Section 8(b)(4)(ii)(B) (Exceptions 1, 2, 3, 4 and 5)

Applying the more appropriate definition of picketing that was in effect before *Eliason & Knuth* and *Brandon II*, the Board should find that Respondent's conduct violated the Act. Although the Judge correctly found that Respondent's use of an amplified recording of a crying baby at a high volume in front of the Atlantic Building from September 17, 2018 through October 19, 2018 was unlawfully coercive conduct and violated Section 8(b)(4)(ii)(B), the Judge wrongly concluded that Respondent's conduct was not picketing and did not violate Section 8(b)(4)(ii)(B). As noted

by the Judge, Respondent admitted that this conduct had a secondary object with the undisputed aim of deterring Post and other neutrals to cease doing business with Major Electric[11]. (ALJD 2:1-5; 11:12-14). Respondent's use of the amplified recording served to threaten, coerce, or restrain Post Brothers and other neutral companies working at the Atlantic Building.

The dissenters in *Eliason & Knuth* and *Brandon II*, were right to expand the definition of coercive conduct that is tantamount to picketing under well-established law. *Eliason & Knuth*, 355 NLRB at 815-16; *Brandon II*, 356 NLRB at 1296-97. As such, when Respondent broadcasted an amplified recording of a crying baby at a high volume, the conduct was unmistakably confrontational and coercive, and was a sign to pedestrians and residents that Respondent was picketing against the owners of the Atlantic Building. Applying the more reasonable definition of picketing that was in effect before *Eliason & Knuth* and *Brandon II*, Respondent's conduct here violated the Act. It is undisputed that Respondent blasted a recording of a crying baby to target Post Brothers, a neutral employer, for hiring Major Electric, a non-union electrical contractor with whom Respondent had a primary dispute. Moreover, the Respondent admitted that this conduct had a secondary object with the undisputed aim of forcing Post Brothers to cease using Major Electric. (JT-1, No. 16; GCX-1(e)).

Judge Giannasi found that the use of the crying baby recording along with peaceful handbilling did not meet the legal definition of picketing because there was no use of picket signs, no patrolling, and no physical or symbolic barrier to prevent neutrals from entering the building. (ALJD 10:43-47). However, the high volume of the crying baby recording with Respondent's agents nearby was tantamount to picketing since the conduct more than visually reinforced the

[11] Respondent admitted that its conduct had a secondary object with the undisputed aim of forcing Post Brothers to cease doing business with Major Electric. (T. 12; GCX-1(e)) Thus, the only issue was whether the conduct was unlawfully coercive under Section 8(b)(4)(ii)(B).

same message contained in the handbills; the conduct was a confrontational symbolic barrier to anyone entering, using, or walking by the Atlantic Building. For five weeks, pedestrians, guests, employees, and contractors who passed by, entered or exited the Atlantic Building on weekdays during business hours could not avoid being subjected to the distressing sound of the crying baby blaring from two amplified speakers. See *Radio-TV Service Technicians, Local 202*, 132 NLRB 1049 (1961) (placing a placard on car doors stationed in front of the building was clearly unavoidable and visible to the public, constituting picketing in violation of Section 8(b)(4)(ii(B)). John Donohoe was the Union agent in charge (ALJD 3:4-5), posted near the front entrance of the Atlantic Building and standing near the amplified recording blasting the crying baby. *See, e.g., Stoltze Land & Lumber*, 156 NLRB at 394 ("[t]he important feature of picketing" is posting union agents near the entrance to a neutral's business); *Jeddo Coal Co.*, 334 NLRB at 686 (same); *Trinity Maintenance*, 312 NLRB at 743 (same); *Kansas Color Press*, 169 NLRB at 283 (same). On many days, Brian Eddis, another Business Agent, joined Donohoe in front of the Atlantic Building. Any pedestrians walking by the Atlantic Building or even walking around the surrounding neighborhood could not avoid the piercing noise of the crying baby. Since Donohoe stood in front of the Atlantic building each day Respondent broadcasted the crying baby, pedestrians and residents confronted Donohue with their complaints as Respondent's agent. See GCX-4(a), 5 and 23[12].

Thus, contrary to the Judge's finding, Respondent's amplified use of the crying baby recording at a high volume was tantamount to picketing because it created a symbolic confrontational barrier to anyone walking by or seeking to enter or use the Atlantic Building. *See*

[12] Although Donohoe's face is not visible in the video admitted as GCX-23, Donohoe admitted that he was the person speaking to the pedestrian. (T. 302).

Eliason & Knuth, 355 NLRB at 815 (Members Schaumber and Hayes, dissenting); *Brandon II*, 356 NLRB at 1296 (Member Hayes, dissenting) (display of rat "now frequent in labor disputes, constitutes a signal to third parties that there is, in essence, an invisible picket line that should not be crossed"). The Board should find that witness testimony and video evidence prove the confrontational nature of the crying baby where residents and pedestrians were forced to confront Respondent's agents about the disturbing noise. GCX-4(a), 5 and 23. Center City One resident Howard Paull and other residents confronted Respondent's agent about how the loud noise of the crying baby affected their neighborhood and that the distressing noise was not helping their cause. (T. 148, 160-161) When Paull confronted Donohoe about the disturbing nature of the crying baby, Donohoe's response was that he had a First Amendment right. (ALJD 5:32-35). Respondent's refusal to stop playing the recording of the crying baby escalated to the point where a Civil Affairs officer had to separate Donohoe and Paull because they were arguing over the noise of the crying baby. (T. 148). Therefore, the recording of the crying baby did not strengthen Respondent's message or solicit the public to engage with Respondent's agents in an effort to understand their grievances but evoked confrontation tantamount to picketing.

Unlike the handbilling in *DeBartolo II*, Respondent did not simply seek to persuade the public about the justice of its cause by disseminating information in a non-confrontational manner such as a handbill, but rather sought to dissuade the public from entering the Atlantic Building and to disrupt the neutral operations of Post Brothers and other subcontractors working inside the building through intimidation and coercion with the crying baby recording. *Eliason & Knuth*, 355 NLRB at 817-18. Judge Giannasi correctly found that the volume of the crying baby "was often set well above level 4 and likely at level 7." (ALJD 7:41-43) Respondent blared the crying baby at such a high volume that it could be heard below street level in the subway and inside the Atlantic

Building where construction work was performed. (ALJD 3:33-36). As such, the noise of the crying baby could be heard clearly and loudly throughout the Atlantic Building while both Post Brothers and its subcontractors were working, interfering with construction. (ALJD 4:5-9; 4:30-32). In fact, Judge Giannasi correctly found that Respondent intentionally turned up the volume of the amplified recording of the crying baby in order "to provoke and interfere with the operations of Post Brothers and other neutrals." (ALJD 7:17-20) Vitali Vasilevich had to relocate subcontractors working on upper floors inside the Atlantic Building because they were disturbed by the noise of crying baby. (T. 199-200) Vasilevich also had to change the manner in which he received daily deliveries because he could not provide instructions over the phone due to the loudness of the crying baby and had to rely on hand gestures. (ALJD 4:28-32;T. 194) The noise of the crying baby also disrupted the operations of other neutral businesses like the Wilma Café. Howard Paull, a frequent customer of the Wilma Café, heard the crying baby from inside the Café and was forced to leave; he could not stay to work at his "go-to" place. (T. 139)

Respondent's use of the crying baby recording at a high volume is tantamount to picketing because it not only created a physical confrontation between Respondent and pedestrian and residents, it also created a symbolic confrontational barrier to anyone seeking to enter or deliver materials to Post Brothers. Residents testified that they could clearly hear the noise of the crying baby blocks away from the Atlantic Building as they were walking around their neighborhood. (ALJD 5:6-8, 20-23, 30-31). If residents and pedestrians could clearly hear the crying baby, so could the neutral contractors delivering materials to Respondent. The amplified recording, in essence, created an invisible picket line that should not be crossed by delivery drivers or any other subcontractor working at the Atlantic Building. *See Eliason & Knuth*, 355 NLRB at 815 (Members Schaumber and Hayes, dissenting); *Brandon II*, 356 NLRB at 1296 (Member Hayes, dissenting).

According to Vitali Vasilevich, he was notified that certain scheduled deliveries would not be made because the driver is a union driver and would not cross the picket line. (T. 195) The driver's delivery refusal can be linked to the crying baby because there were no other labor protests occurring at the Atlantic Building when the crying baby was being broadcasted. Vasilevich testified that he heard the crying baby being broadcasted when he was informed that drivers would not cross the picket line, and it is undisputed that there were no inflatable rats or any other labor protest outside the Atlantic Building when the crying baby was being broadcasted. (ALJD 2:fn. 3; T. 59-60, 195-196) In other words, Respondent's broadcasting of the crying baby was the only labor protest outside the Atlantic Building when some drivers refused to make the deliveries.

Accordingly, contrary to the Judge, Respondent's use of an amplified recording of crying baby from September 17, 2018 through October 19, 2018 was tantamount to unlawful secondary picketing and should be found to have violated Section 8(b)(4)(ii)(B).

E. First Amendment Concerns Are Not Implicated

As Respondent engaged in conduct that was tantamount to unlawful secondary picketing, First Amendment concerns are not implicated, inasmuch as it is settled law that the First Amendment does not shield unlawful secondary picketing. *DeBartolo II*, 485 U.S. at 579-80; *Safeco Title Ins. Co.*, 447 U.S. at 616. See also *International Brotherhood. of Electrical Workers, Local 501 v. NLRB*, 341 U.S. at 705. In Section 8(b)(4), Congress sought to prohibit the "substantive evil" of the secondary boycott, and the Supreme Court has recognized that the First Amendment does not shield conduct that falls afoul of that prohibition. Id. (secondary picketing, as well as phone calls emphasizing the purpose of the picketing, not protected by the First Amendment). See also *Safeco*, 447 U.S. at 616 ("[a]s applied to picketing that predictably encourages consumers to boycott a secondary business, §8(b)(4)(ii)(B) imposes no impermissible

restrictions upon constitutionally protected speech"). As the Supreme Court in *International Longshoremen's Association v. Allied International*, 456 U.S. 212, 226-27 (1982), has observed:

> We have consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment. … It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment. The labor laws reflect a careful balancing of interests. … There are many ways in which a union and its individual members may express their [views] without infringing upon the rights of others. (Citations and footnotes omitted.)

See also *United Brotherhood of Carpenters and Joiners of America v. Sperry*, 170 F.2d 863, 869 (10th Cir. 1948) (placement of neutral employer on blacklist, promulgation of the blacklist, and picketing the neutral employer unprotected by the First Amendment).

Respondent does not have an unfettered First Amendment right to make noise to support its secondary message. (ALJD 12:30-33) The use of noise in the circumstances here is not, like handbilling, protected speech under the U.S. Supreme Court's decision under *DeBartolo II*. *DeBartolo II,* 485 U.S. at 579-80. In *DeBartolo II*, a union's distribution of leaflets was deemed protected speech under the proviso of where there was no intimidation or confrontation accompanying handing out the leaflets and the only message conveyed was that contained in the words of the handbills. As the Board noted in *General Maintenance*, supra, the union's conduct in *DeBartolo II* was "merely expressive conduct" and not "a combination of conduct and communication more likely to be found coercive under the Act." Id. at fn. 4.

Moreover, in other circumstances, the Supreme Court has upheld limitations on disruptive amplified noise notwithstanding free speech concerns. In *Kovacs v. Cooper*, 336 U.S. 77 (1949), a plurality of the Supreme Court upheld a municipal ordinance that banned "loud and raucous" amplified noises. In *Kovacs*, the Supreme Court sought to strike a balance between speakers' ability

to “win the attention” of the “minds of willing listeners,” while protecting the general rights of the population to live their lives, associate with each other, and conduct their business in peace. Id. at 88. The Court in *Kovacs* specifically noted that there is no significant curtailment of free speech by a prohibition of loud and raucous noises where there are other means of dissemination such as by handbills. Id. at 89. See also *Pine v. City of W. Palm Beach, FL*, 762 F.3d 1262, 1274-1275 (11th Cir. 2014); *Klein v. City of Laguna Beach*, 594 F. Supp. 2d 1142, 1145 (C.D. Cal. 2009).

Here, Respondent freely distributed handbills each day they broadcasted the raucous noise of the crying baby. Respondent cannot argue that such distributions were “ineffective to communicate with those who would *voluntarily* entertain Respondent's message” or that it was unable to express its views without infringing on the rights of others. *Society Hill Towers*, supra, at 826. In the instant matter, Respondent had another means of peacefully communicating its message with its handbills to those who voluntarily accepted Respondent’s message. Broadcasting the crying baby, on the other hand, invaded the homes of Center City One residents who could not escape the pervasive noise even with their windows and doors closed. Although the recording consisted of both a crying baby and a recorded message, the words on the recorded message were at best, unintelligible and garbled with the crying baby. More importantly, the residents testified that they could not hear any words, only the constant noise of the crying baby. (ALJD 5:2-3; T. 40, 65) Amplifying a recording of a crying baby intermingled with some words is not the same as the speech protected under the publicity proviso set forth in *DeBartolo II.* Here, Judge Giannasi correctly found that the crying baby was the most prominent part of the recording and that the brief worded message, which did not even mention the disputed entity Major Electric, had no real message. (ALJD 12:23-26) Just as in *Society Hill Towers*, Judge Giannasi correctly found that the First Amendment does not protect excessive noise making. (ALJD 12:27-29) In *Society Hill*

Towers, the Board rejected the union's First Amendment argument as a defense to broadcasting its message through an amplified sound system. The Board determined:

> It cannot be argued that, no matter how loud its broadcasts were conducted, no violation of the Act can be found because the broadcasts were mere speech and thereby protected by the First Amendment If the Respondent could conduct its broadcast at any volume it chose, then people in their homes, and even in their businesses are vulnerable to life-altering disruptions as the technology of portable high-volume sound reproduction evolves. Fortunately for the peace and dignity of the country, and for the livability of our homes, this is not the case.

Society Hill Towers, 335 NLRB at 826.

Respondent's amplified broadcasting did not simply seek to persuade the public about the justice of its cause by disseminating information in a non-confrontational manner such as a handbill, but rather sought to dissuade Post Brothers to cease doing business with Major Electric through the use of excessively loud noise by disrupting the operations of Post Brothers and its neutral subcontractors. By doing so, Respondent's conduct is tantamount to picketing and stepped outside the protection of *DeBartolo II* and went beyond the lawful means of persuasion. To the extent that Respondent's use of broadcasting a crying baby can be considered to be speech, its use here is unlawful under the Act and not protected under the First Amendment because it was excessively loud and was used specifically to coerce in aid of an unlawful purpose – a secondary boycott. *Allied International*, supra.

To the extent this conduct involved "speech," it was labor speech, and was therefore entitled to lesser First Amendment protection. And, although Respondent's flyer contained some language urging the public to pressure Major Electric to pay area wages and standards, the gravamen of Respondent's overall conduct was to convey to the public that Post Brothers should cease doing business with Major Electric. As such, Respondent's "speech" constituted commercial speech arguing the merits of a business, as opposed to pressing the benefits to the public of union

area wages and standards, and it is entitled to lesser constitutional deference for that reason as well. Thus, Respondent's First Amendment defense lacks merit. Respondent's use of an amplified recording of a crying baby at an excessively loud volume was confrontational and interfered with the operations of Post Brothers and the subcontractors working inside the Atlantic Building, was a symbolic barrier that prevented neutrals from making deliveries to Post Brothers, and thus was tantamount to picketing and violated Section 8(b)(4)(ii)(B).

VI. CONCLUSION AND REMEDY

For the reasons set forth above, Counsel for the General Counsel respectfully urge the Board to find that Respondent engaged in unlawful picketing and violated Section 8(b)(4)(ii)(B) of the Act when Respondent, from September 17, 2018 through October 19, 2018, used an amplified sound system to broadcast a recording of a crying baby at the entrance of the Atlantic Building, with an object of forcing or requiring Post Brothers, and other persons engaged in commerce, or in an industry affecting commerce, to cease doing business with Major Electric.

As remedies for these violations, Counsel for the General Counsel requests that Respondent should be required to cease and desist from its unfair labor practices, post an appropriate Notice to Members, a proposed copy of which is attached as Appendix A, and any other relief you deem appropriate.

Respectfully submitted,

Dated: June 3, 2020

/s/ Jun S. Bang

JUN S. BANG
Counsel for the General Counsel
National Labor Relations Board
Fourth Region, The Wanamaker Bldg.
100 Penn Square East, Suite 403
Philadelphia, Pennsylvania 19107
jun.bang@nlrb.gov

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

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

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT, by picketing, broadcasting a recording of a crying baby, threatening an employer with damaging property, or by any like or related acts or conduct, threaten, restrain, or coerce Post General Contracting, LLC, or any other person engaged in commerce or in an industry affecting commerce, where an object of our actions is to force or require Post General Contracting, LLC or any other or any person to cease doing business with Major Electric, or any other person engaged in commerce.

WE WILL NOT in any like or related manner threaten, coerce, or restrain you in the exercise of your rights under Section 7 of the Act.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98
(Labor Organization)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine

whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at https://www.federalrelay.us/tty *(link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.*

100 East Penn Square, Suite 403
Philadelphia, PA 19107

Telephone: (215) 597-7601
Hours of Operation: 8:30 a.m. to 5 p.m.

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

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

I hereby certify that copies of **GENERAL COUNSEL'S EXCEPTIONS TO THE CHIEF ADMINISTRATIVE LAW JUDGE'S DECISION** and **BRIEF IN SUPPORT OF EXCEPTIONS TO THE CHIEF ADMINISTRATIVE LAW JUDGE'S DECISION** in Case 04-CC-229379 was served on the 3rd day of June, 2020, on the following persons by email:

Cassie Ehrenberg, Esq.
William Josem, Esq.
Cleary, Josem & Trigiani LLP
Constitution Place
325 Chestnut Street
Suite 200
Philadelphia, PA 19106
cehrenberg@cjtlaw.org
wtjosem@cjtlaw.org

Daniel Sobol, Esq.
Brandon Shemtob, Esq.
Stevens & Lee, P.C.
1818 Market Street
29th Floor
Philadelphia, PA 19103
djso@stevenslee.com
bss@stevenslee.com

Respectfully submitted,

/s/ Jun S. Bang

JUN S. BANG
Counsel for the General Counsel
National Labor Relations Board
Fourth Region
The Wanamaker Building
100 Penn Square East, Suite 403
Philadelphia, Pennsylvania 19107
jun.bang@nlrb.gov