UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98,

Respondent,

and **Case 04-CC-229379**

POST GENERAL CONTRACTING, LLC d/b/a POST BROTHERS,

Charging Party.

RESPONDENT'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE CHIEF ADMINISTRATIVE LAW JUDGE'S DECISION

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July 1, 2020

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Pursuant to Section 102.46(b) of the Rules and Regulations of the National Labor Relations Board ("Board"), Respondent, International Brotherhood of Electrical Workers, Local 98 ("Local 98" or "Union" or "Respondent"), submits this brief in answer and in opposition to the Exceptions and supporting brief filed by the General Counsel to the Chief Administrative Law Judge's ("ALJ") decision ("ALJD").

The General Counsel excepted to the ALJ's determination that the Union's broadcasting of a recorded audio message ("Audio Recording") in front of 260 South Broad Street, Philadelphia Pennsylvania ("260 South Broad" or "the Atlantic Building"), a property being renovated by a secondary employer, the Charging Party, Post General Contracting, LLC d/b/a Post Brothers ("Post Brothers"), was not picketing and did not create a symbolic barrier under Section 8(b)(4)(ii)(B) of the National Labor Relations Act ("Act"). (GC Exceptions 1-5)

I. PROCEDURAL HISTORY AND FACTUAL STATEMENT

A. Procedural History

The Union adopts by reference the procedural history as summarized in its Brief In Support of Exceptions to the Chief Administrative Law Judge's Decision ("Respondent's Exceptions Brief").[1] (Respondent's Exceptions Brief, p. 1)

[1] Throughout this brief, record citations will be designated as follows and each abbreviation will be followed by the specific page, line, exhibit, or exception number: the General Counsel's Exceptions and the brief in support will be "GC Exceptions" and "GC Brief"; the Decision of Chief Administrative Law Judge Robert A. Giannasi in this matter will be "ALJD"; the transcript will be "Tr."; exhibits from the General Counsel, the Respondent, and the Charging Party, will respectively be "GC-," "R-" and "CP-" and joint exhibits will be "Jt-."

B. Factual Statement

The Union adopts by reference the factual statement as summarized in Respondent's Exceptions Brief. (Respondent's Exceptions Brief, p. 2-8)

II. ARGUMENT

The ALJ was correct in holding that the Union did not engage in picketing or in creating a symbolic barrier under Section 8(b)(4)(ii)(B) of the National Labor Relations Act ("Act") by its speech in September and October 2018. (ALJD, 10:25-30, 10:43-47, 11:4-5, 13:35-37; GC Exceptions 1-5) If the Board were to determine that the Union's speech violated Section 8(b)(4)(ii)(B), it would violate the First Amendment to the United States Constitution, as applied. As such, the Board should also affirm the ALJ's decision on these issues because it has an obligation to apply the doctrine of Constitutional avoidance. The Union adopts by reference the relevant sections in Respondent's Exceptions Brief.

A. The Union's Speech Was Not Unlawful Picketing (or Tantamount to Unlawful Picketing) Under Section 8(b)(4)(ii)(B) (General Counsel's Exceptions 1-5)

The General Counsel encourages the Board to enlarge the definition of "picketing" to include playing the Audio Recording (a baby crying followed by a substantive message on a loop) near a secondary employer's construction location. This argument bloats and distorts the definition of picketing beyond its ordinary meaning and beyond its labor-specific meaning. Adhering to the current standard, the ALJ here properly declined to conclude that the Union's playing of an audio recording was unlawful picketing in violation of Section 8(b)(4)(ii)(B). (ALJD, 10:25-30, 10:43-47, 11:4-5, 13:35-37)

1) *Eliason* and *Brandon II* Were Properly Decided

The General Counsel asks the Board to overrule its current standard as set forth in *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010) (*Eliason*), and *Sheet Metal Workers Local 15 (Brandon Medical Center)*, 356 NLRB 1290 (2011) (*Brandon II*), to return to an earlier standard to find that the Union engaged in picketing by playing the Audio Recording to the public. It is Respondent's position that *Eliason & Knuth* and *Brandon II* were well-reasoned, sound, and properly based on the Supreme Court's decision in *DeBartolo v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988) (*DeBartolo II*). These decisions should not be disturbed.

In *Eliason*, the Board held that the union's action in placing banners (3 to 4 feet high and 15 to 20 feet long) on public sidewalks as close as 15 feet from entrances with representatives posted at the banners and distributing flyers was not picketing and did not violate the Act. *Eliason*, 355 NLRB at 798. In that decision, the Board explained that carrying picket signs and persistent patrolling were necessary to establish picketing. *Eliason*, 355 at 802 (citation omitted). Indeed, this is the ordinary definition and the labor-context specific definition of the word picketing. The Board also explained that the picket line was the symbolic barrier and that other non-proscribed conduct should not be defined as "picketing" unless it actually is picketing:

> expressive activity that bears some resemblance to picketing should not be classified as picketing unless it is qualitatively different from other nonproscribed means of expression and the qualitative differences suggest that the activity's impact owes more to intimidation than persuasion. Precisely for this reason, the term picketing has developed a core meaning in the labor context. The Board and courts have made clear that picketing generally involves persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite.

Eliason, 355 NLRB at 802 (citations omitted).

In addition, the Board in that case explicitly rejected an attempt by the General Counsel—which sounds remarkably like the attempt here—to expand and warp the definition of "picketing." The Board explained that the General Counsel's argument to expand the definition of picketing was inconsistent with the United States Supreme Court's decision in *DeBartolo II*. There, the Supreme Court described violative activity as a "line of picketers," *DeBartolo II*, 485 U.S. at 579 n.3, 580 (1988), that confronts would-be entrants to a site. The Board in *Eliason* explained that it had already considered and rejected this argument:

> In order to sweep the display of stationary banners into the prohibition contained in Section 8(b)(4)(ii)(B), the General Counsel proposes a broad definition of picketing that strips it of its unique character and is at odds with the Supreme Court's decision in *DeBartolo*. The General Counsel argues that "picketing exists where a union posts individuals at or near the entrance to a place of business for the purpose of influencing customers, suppliers, and employees to support the union's position in a labor dispute." The General Counsel adds, "the posting of individuals in this fashion is inherently confrontational within the meaning of the Act." Yet shortly after *DeBartolo* was decided, the Board explained that the decision held "that Section 8(b)(4)(ii)(B) of the Act does not proscribe peaceful handbilling and other nonpicketing publicity urging a total consumer boycott of neutral employers." *Service Employees (Delta Air Lines)*, 293 NLRB 602, 602 (1989). The Board has thus already rejected the General Counsel's overbroad definition of picketing.

Eliason, *supra*, 355 NLRB at 803.

Not long after its decision in *Eliason*, the Board issued Brandon *II* which considered a 16 foot tall inflatable rat on top of a flatbed trailer about 100 feet from the entrance to a hospital and a stationed member holding a leaflet with outstretched arms directed toward traffic at the entrance. The Board, drawing on its own decision in *Eliason* and on the Supreme Court's decision in *DeBartolo II*, determined that the inflatable display did not violate Section 8(b)(4)(ii)(B) because it was neither picketing nor otherwise coercive. *Brandon II*, 356 NLRB at 1292.

There is no discernable reason for the General Counsel to bastardize this word as is requested here. Section 8(b)(4)(ii)(B) of the Act—the section at issue in this case—states, in pertinent part, that it shall be an unfair labor practice for a labor organization or its agents:

> (ii) to **threaten, coerce, or restrain** any person engaged in commerce or in an industry affecting commerce, where … an object thereof is --
> (B) forcing or requiring any person to … cease doing business with any other person.

29 U.S.C. § 158(b)(4)(ii)(B) (emphasis added). The word "picketing" is not found in this provision. Rather, the word "picketing" was used by the *DeBartolo II* Court and the Board to determine whether there has been sufficient coercion, as required by the provision. In *DeBartolo II*, the Court held that its peaceful handbilling of the secondary employer was protected by the First Amendment and explained that in order to find a violation, conduct by a union must cross the line from persuasion to coercion:

> [M]ore than mere persuasion is necessary to prove a violation of § 8(b)(4)(ii): that section requires a showing of threats, coercion or restraints. Those words, we have said, are 'nonspecific, indeed vague,' and should be interpreted with 'caution' and not given a 'broad sweep.'

485 U.S. at 578 (quoting *NLRB v. Drivers*, 362 U.S. 274, 290 (1960)). The General Counsel wants to cherry pick which portion of *DeBartolo II* is followed by the Board by arguing not with the Supreme Court's use of the word "picketing," but instead with its definition.

The current test, developed in *DeBartolo II, Eliason*, and *Brandon II*, properly addresses the statutory language. Although Respondent disagrees with (and has excepted to) the ALJ's conclusions that Local 98's Audio Recording violated Section 8(b)(4)(ii), he at least understood that under the Supreme Court's controlling precedent and the statutory language (as well as the Board's current standard) the issue is not whether conduct is picketing, but rather whether it rises to the level of unprotected coercion. The General Counsel now wants to change the Board's

Eliason/*Brandon II* standard and in doing so wants to circumvent the Supreme Court's *DeBartolo II* decision and ignore the actual words in the statute.

2) The Cases Cited By The General Counsel To Support A Broader Definition of Picketing Are Not Applicable

The pre-*Eliason*/*Brandon II* cases cited by the General Counsel (GC Brief, p. 19-23), fail to show that the Board's older and broader definition would be applicable to the instant case. These cases share an important common thread: In each, the violating conduct was an actual physical presence—such as a picket line of people or individuals posted near or with signs. See, *Mine Workers District 2 (Jeddo Coal Co.)*, 334 NLRB 677, 686 (2001) (six posted individuals with picket signs but without patrolling); *Painters District Council 9 (We're Associates)*, 329 NLRB 140, 142 (1999) (individuals with picket signs walking back and forth or standing); *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 743 (1993) (blocking doors and other conduct in front of a neutral's building); *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 72 (1991) (picketing found for mass gathering of 50-140 strikers circling the parking lot of a secondary business); *Laborers Local 389 (Calcon Const.)*, 287 NLRB 570, 573 (1987) (patrolling or posted individuals with or near signs); *Lawrence Typographical Union 570 (Kansas Color Press)*, 169 NLRB 279, 283 (1968) (sign placed on corner and gathered strikers).[2] The physical presence in these cases is not present here as the only conduct argued to be "picketing" by the General Counsel is the sound of the Audio Recording. Extension of the Board's definition of picketing to include sound simply makes no sense and would not likely

[2] Included in the Counsel for the General Counsel's list of cases trying to show a history of the Board using a broader and more flexible definition of "picketing" are two cases which address Section 8(b)(7), where the word "picket" actually appears. *Lumber & Sawmill Workers Local Union No. 279 (Stoltze Land & Lumber)*, 156 NLRB 388, 394 (1965) (picket line followed by members confronting employees and prospective employees rather than the public); *NLRB v. Teamsters Local 182 (Woodward Motors)*, 314 F.2d 53 (2d Cir. 1963), enfd. 135 NLRB 851 (1962) (signs placed in snowbanks and individuals posted in heated cars). Even there, the Board looked at the union's physical presence.

survive a *DeBartolo II* analysis. Even in *Metropolitan Regional Council, Carpenters (Society Hill Towers Owners' Assn)*, 335 NLRB 814, 827-28 (2001) (*Society Hill Towers*), where the Carpenters' conduct was far more extreme than any conduct in this case, the Board declined to consider the garbled non-communicative noise, which the union had amplified through loudspeakers directed at a residential building during all hours of the day and night, to be picketing.

Additionally, the pre- *Eliason/Brandon II* cases cited by the General Counsel, said that picket signs and patrolling are not in particular prerequisites to find "picketing." See, e.g., *We're Associates*, 329 NLRB at 142 ("It is well settled that patrolling either with or without signs is not essential to a finding of picketing. … Thus, where groups of men are gathered around a sign, or are "milling around" carrying signs at entrances to facilities, they are engaged in picketing.") (citations omitted). That the Board in these older cases may not have required patrolling or the carrying of picket signs to find "picketing" does not mean that picketing includes any and all conduct at a union protest. In this case, the only conduct at issue regarding the General Counsel's argument to expand the definition of the word "picketing" is playing the Audio Recording. (The General Counsel made no allegation nor presented any evidence that anyone from the Union gathered around signs, held a picket sign, gathered to become pickets, formed a "line" of protestors, marched or walked in a patterned elliptical manner, had a gauntlet of pickets, a line of pickets, massed, blocked any ingress or egress, or any such physical activity.)[3] Having sound meet the definition of "picketing" is stretching the word past any meaningful point. The ALJ was correct in concluding that the Union's conduct throughout this protest cannot

[3] In their Brief, the General Counsel tries to tack on John Donohoe and Brian Eddis's presence at the Audio Recording as evidence of picketing. This was not alleged in the Complaint as a violation of the Act and the ALJ made no such determination on this issue. It cannot now be asserted as a way of bolstering the argument for an expanded definition of "picketing" at this juncture. (GC Brief, page 25; GC Ex-1(c))

be said to be picketing or tantamount to picketing.[4] (ALJD, 10:25-30, 10:43-47; 11:4-5; GC Exceptions 1-5)

B. A Ruling That The Union's Speech Was Picketing In Violation of Section 8(b)(4)(ii)(B) Would Violate the First Amendment As Applied And The Board Should Apply The Doctrine of Constitutional Avoidance

A ruling by the Board that the Union's speech—conveyed in part by playing the Audio Recording—violates Section 8(b)(4)(ii)(B) would violate the First Amendment and as such, the Board has an obligation to apply the principle of constitutional avoidance. The Union adopts by reference the argument set forth in Respondent's Exceptions Brief regarding the Board's duty to apply doctrine of constitutional avoidance and that finding a violation of Section 8(b)(4)(ii)(B) would violate the First Amendment as applied.

In addition to the First Amendment argument which Respondent has already set forth in its Exceptions Brief, it is worth discussing in particular here the General Counsel's request that the Board adopt the position that labor speech is commercial speech. (GC Brief, 17-18, 31) The General Counsel relies on *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) and cited language in a footnote from that case that the speech of labor disputants is "'subject to a number of restrictions.'" (GC Brief, page 17 citing *Virginia State Bd. Of Pharmacy*, 425 U.S. 748, 763 fn. 17 (1976)). However, as the ALJ in *International Union of Operating Engineers, Local 150 and Lippert Components, Inc.*, 2019 WL 3073999 (Div. of Judges, July 15, 2019) (*Lippert*) noted: "The General Counsel omits from their argument

[4] The General Counsel also makes an argument that the Audio Recording created an "invisible picket line." (GC Brief, page 27) As set forth above, this stretches the meaning of "picketing" to an absurd result that has never before been contemplated by the Board's cases, even those which pre-date the current standard. Moreover, there was no allegation or evidence that the Audio Recording interfered in any way with pedestrian traffic, there was no blocking of any entrance or exit, and there was no evidence of any invisible picket line. (GC-1(c), GC-4(a), GC-5, GC-8(a), GC-8(b), GC-9, GC-10, R-8)

the remainder of the footnote reading, '[t]he constitutionality of restrictions upon speech in the special context of labor disputes is not before us here. We express no views on that complex subject.'" *Lippert*, 2019 WL 3073999 (citing *Virginia State Bd. Of Pharmacy*, 425 U.S. at 763, fn. 17). The General Counsel also points to *United Brotherhood of Carpenters and Joiners of America v. Sperry*, 170 F.2d 863, 869 (10th Cir. 1948), which addressed a union blacklisting an employer and picketing, all of which resulted in refusals to work. These facts are clearly distinguishable from the instant case which made no request for, nor result in, a work-stoppage. Additionally, using this non-binding 70-year-old 10th Circuit case is misleading given the plethora of cases which have held that labor speech is entitled to First Amendment protections and which do not apply reduced commercial speech scrutiny. See e.g., *DeBartolo*, 485 U.S. at 576 (finding that the union's leafletting was not commercial speech); *H.A. Artists v. Actors Equity Ass'n*, 451 U.S. 704, 715 n.16 (1981) (recognizing that union activities are not commercial under the Clayton Act); *Thomas v. Collins*, 323 U.S. 516, 540 (1945); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940); *Schnieder v. State*, 308 U.S. 147, 165 (1939); *Sheet Metal Workers Local 15 v. NLRB*, 491 F.3d 429, 436-37 (D.C. Cir. 2007) (union protests about healthcare quality arising from hospital's use of nonunion subcontractor held protected as noncommercial speech).[5]

[5] Although Respondent is only arguing here that the First Amendment would be violated on an as applied basis, it does not waive any argument that Section 8(b)(4)(ii)(B) should be held invalid on its face under the First Amendment to the United States Constitution. See *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015).

III. CONCLUSION

For the foregoing reasons, the Union submits that the Exceptions filed by the General Counsel should be denied in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Respondent's Answering Brief To the Exceptions of the General Counsel To The Chief Administrative Law Judge's Decision was electronically filed and served on the following via email:

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