

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

Respectfully submitted,

Dated: July 1, 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. STATEMENT OF FACTS ..... 2

    A. *Background*..... 2

    B. *On September 17, 2018 Respondent Broadcasted a Recording of the 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

III. RESPONDENT’S EXCEPTIONS..... 15

IV. ARGUMENT ..... 15

    A. *Credibility*..... 15

        1. *The Judge Correctly Found That General Counsel’s Witnesses Were Credible (Exception 17) ...* ..... 17

        2. *The Judge Correctly Found That Respondent’s Witnesses Were Not Credible. (Exception 17) ...* ..... 19

    B. *The Judge Correctly Found That the Amplified Volume of the Crying Baby Recording Was Set at a High Volume (Exceptions 1, 2, 11).* ..... 24

    C. *The Judge Correctly Found That the Air Management Reports Were Not Reliable and the Noise Level Violated the City’s Noise Regulations (Exceptions 3, 4, 5)* ..... 26

    D. *The Judge Correctly Found that Brian Eddis Impliedly Threatened to Set Fire the Property of Post Brothers’ Representative Patrick Steffa (Exceptions 6, 7, 15, 16 and 18)* ..... 29

    E. *Applicability of Section 8(b)(4)(ii)(B) Law*..... 32

    F. *In the Sphere of Labor Relations, the Government Has a Substantial Interest in Justifying Some Restraints on First Amendment Freedoms (Exception 12, 13, 18)* ..... 34

    G. *The Judge’s Findings and Conclusion that Respondent’s Conduct Violated 8(b)(4)(ii)(B) Do Not Implicate First Amendment Concerns (Exception 12, 13, 18)*..... 36

*H. The Judge Correctly Concluded that Respondent’s Use of an Amplified Recording of a Crying Baby was Coercive Conduct Violating Section 8(b)(4)(ii)(B) of the Act (Exceptions 2, 8, 9, 10, 14, 18, 19) ..... 41*

*I. The Judge Issued a Proper Order Regarding Respondent’s Coercive Conduct (Exception 19 )... 48*

V. CONCLUSION AND REMEDY ..... 49

## TABLE OF CASES

<i>Building Service Employees, Local 254 (University Cleaning Co.),</i> 151 NLRB 341 (1965) .....	47
<i>Carpenters Local 1506 (Eliason &amp; Knuth of Arizona),</i> 355 NLRB 797 (2010).....	33, 39, 41, 43, 44, 45
<i>Daikichi Sushi,</i> 335 NLRB 622 (2001).....	16
<i>Edward J. DeBartolo Corp. v. Florida Gulf Coast Building &amp; Construction Trades Council,</i> <i>(DeBartolo II),</i> 485 U.S. 568 (1988).....	33, 34, 35, 37
<i>Heffron v. Int’l Society for Krishna Consciousness,</i> 455 U.S. 640 (1981) .....	38
<i>International Bhd. of Elec. Workers, Local 501 v. NLRB,</i> 341 U.S. 694 (1951) .....	35
<i>International Harvester Co.,</i> 226 NLRB 166 (1976).....	17
<i>International Longshoremens' Association v. Allied International,</i> 456 U.S. 212 (1982) .....	37, 40
<i>Iron Workers Union Local No. 378 (N.E. Carlson Construction),</i> 302 NLRB 200 (1991).....	16
<i>Klein v. City of Laguna Beach,</i> 594 F. Supp. 2d 1142 (C.D. Cal. 2009).....	38
<i>Kovacs v. Cooper,</i> 336 U.S. 77 (1949) .....	37, 38
<i>Lawrence Typographical Union 570 (Kansas Color Press),</i> 169 NLRB 279 (1968).....	33
<i>Lumber &amp; Sawmill Workers Local Union No. 2792 (Stoltze Land &amp; Lumber),</i> 156 NLRB 388 (1965).....	33
<i>Machinists District 751 (Boeing Co.),</i> 270 NLRB 1059 (1984).....	16
<i>Medeco Security Locks,</i> 322 NLRB 664 (1996).....	15
<i>Metropolitan Regional Council, Carpenters (Society Hill Towers),</i> 335 NLRB 814, (2001).....	34, 39, 40, 41, 42, 47
<i>Mine Workers (New Beckley Mining),</i> 304 NLRB 71 (1991).....	33, 47
<i>NLRB v. Catholic Bishop of Chicago,</i> 440 U.S. 490 (1979) .....	35
<i>NLRB v. Denver Building and Construction Trades Council,</i> 341 U.S. 675 (1951) .....	33
<i>NLRB v. Fruit Packers (Tree Fruits),</i> 377 U.S. 58 (1964) .....	33
<i>NLRB v. Operating Engineers Local 825 (Burns &amp; Roe, Inc.),</i> 400 U.S. 297 (1971) .....	33

<i>NLRB v. Retail Clerks Local 1001(Safeco Title Ins. Co.)</i> , 447 U.S. 607 (1980) .....	32, 33, 35, 36
<i>Penasquitos Village v. NLRB</i> , 565 F.2d 1074 (9th Cir. 1977).....	15
<i>Pine v. City of W. Palm Beach, FL</i> , 762 F.3d 1262 (11th Cir. 2014).....	38
<i>Plumbers and Pipe Fitters Local No. 142 (Shop-Rite Foods, Inc.)</i> , 133 NLRB 301 (1961).....	32
<i>Pye v. Teamsters Local 122</i> , 61 F.3d 1013 (1st Cir. 1995) .....	47
<i>Service Employees Local, 87 (Trinity Maintenance)</i> , 312 NLRB 715 (1993) .....	33, 34, 47
<i>Service Employees Local 399 (William J. Burns Agency)</i> , 136 NLRB 431 (1962).....	34, 47, 48
<i>Service Employees Local 525 (General Maintenance Co.)</i> , 329 NLRB 638 (1999).....	34, 37, 47
<i>Sheet Metal Workers Local 15 (Brandon Medical Center)</i> , <i>(Brandon II)</i> , 356 NLRB 1290 (2011) .....	45
<i>Shen Automotive Dealership Group</i> , 321 NLRB 586 (1996).....	15
<i>Shop-Rite Supermarket</i> , 231 NLRB 500 (1977).....	16
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (195).....	16
<i>Startzell v. City of Philadelphia</i> , 533 F.3d 183 (3d Cir. 2008).....	38
<i>Teamsters Local 85 (Victory Transportation, Inc.)</i> , 180 NLRB 709 (1970).....	32
<i>Union de Tronquistas de Puerto Rico, Local 901 (F.F. Instrument Corporation)</i> , 210 NLRB 1040 (1974).....	32
<i>United Brotherhood of Carpenters and Joiners of America v. Sperry</i> , 170 F.2d 863 (10th Cir. 1948).....	35, 37
<i>Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council</i> , 425 U.S. 748 fn. 17 (1976).....	34, 35
<i>Ward v. Rock against Racism</i> , 491 U.S. 781 (1980) .....	38
<i>West Irving Die Casting of Kentucky, Inc.</i> , 346 NLRB 349 (2006).....	17

Statutes

29 U.S.C. § 158 (b)(4)(ii)(B) .....	32, 35, 36
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## I. INTRODUCTION

Counsel for the General Counsel, pursuant to Section 102.46(d) of the Board's Rules and Regulations, respectfully files this answering brief opposing the exceptions filed by Respondent International Brotherhood of Electrical Workers, Local 98 (Respondent).

Chief Administrative Law Judge Robert A. Giannasi issued his decision in this case on May 6, 2020. There, 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 Respondent on various dates between September 17, 2018 through October 19, 2018 constituted unlawful secondary coercion in violation of Section 8(b)(4)(ii)(B) of the Act. Judge Giannasi 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<sup>1</sup>. The Union's continuous broadcasting of a crying baby recording at a high volume was clearly confrontational, coercive conduct, rather than speech, aimed to interfere with a neutral employer's business by disrupting operations and dissuading people from seeking to access the property and/or do business with a neutral employer. This conduct aimed at the neutral employer clearly violated Section 8(b)(4)(ii)(B) of the Act. This brief addresses assertions Respondent made in its brief in support of its exceptions<sup>2</sup>.

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<sup>1</sup> Judge Giannasi, however, concluded that this conduct was not picketing in violation of Section 8(b)(4)(ii)(B) of the Act. (ALJD 10:29-30). The General Counsel filed Exceptions to the Judge's finding on this issue on June 3, 2020.

<sup>2</sup> 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.

## **II. STATEMENT OF FACTS**

### ***A. Background***

Charging Party Post General Contracting d/b/a Post Brothers (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 the 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 a 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  
260 South Broad Street.  
Major Electrical Systems  
**REFUSES** to play employees a **wage and benefit**  
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 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 a 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<sup>3</sup>. (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) 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))<sup>4</sup>; 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

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<sup>3</sup> 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)

<sup>4</sup> All video evidence can be seen by accessing the link provided with the exhibits.

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 September 18, 2018, Patrick Steffa had a face to face conversation with Brian Eddis that began as a friendly conversation but got more heated<sup>5</sup>. (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,

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<sup>5</sup> Respondent asserts that this conversation took place on Sept. 17, 2018 based on Eddis' testimony. However, the Judge correctly credited Steffa over Eddis regarding this conversation. Although Steffa could not recall exact dates during this testimony, Steffa testified that his conversation with Eddis took place before Air Management arrived, and the Judge correctly determined that Steffa and Everly first spoke on September 18<sup>th</sup>. (ALJD 6:6, fn. 6) Respondent did not except to the Judge's finding that the initial conversation between Steffa and Everly occurred on September 18, 2018.

“that if Major Electric left that the crying baby would leave too.” (ALJD 10:1; T. 111) This is an un rebutted admission, since Eddis did not deny making this statement during his testimony, nor did he refute Steffa’s statement about the fire burning another bar near Steffa’s establishment a year earlier. (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 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 but this time 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, ftn. 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 9<sup>th</sup> floor all the way up to the 25<sup>th</sup> 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 23<sup>rd</sup> floor. (ALJD 5:1-2<sup>6</sup>; 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 25<sup>th</sup> 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 11<sup>th</sup> 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 of Center City One with no view of the Atlantic Building, and she

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<sup>6</sup> Judge Giannasi noted that Pamela Bona lived on the 22<sup>nd</sup> floor, but Bona lived on the 23<sup>rd</sup> floor. (ALJD 5:1; T. 31)

could 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 inside his apartment. (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<sup>7</sup>. (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

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<sup>7</sup> 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 15<sup>th</sup> and Spruce, and one and a half block East towards 13<sup>th</sup> 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 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. Executive Protection Director 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) Inventory Manager 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 the loudness even made it difficult for him to communicate on the radio that controlled the buck hoist, a type of lift or elevator. (ALJD 4:7-98; T. 120-121) 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)) Donohoe 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 below Broad Street until he reached Locust Street to catch 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.

### **III. RESPONDENT'S EXCEPTIONS**

Respondent filed 19 exceptions to the Judge's decision. Respondent has excepted to the Judge's factual conclusions, credibility determinations and legal conclusions to argue that the Judge incorrectly concluded that Respondent's use of an amplified recording of a crying baby at a high volume was coercive conduct and violated Section 8(b)(4)(ii)(B) of the Act. Respondent also excepts to the Judge's findings that Brian Eddis, Respondent's Agent, impliedly threatened physical harm or harm to the property of a Post Brother's representative in violation of Section 8(b)(4)(ii)(B) of the Act. The General Counsel disputes each of Respondent's exceptions. The Board should reject all of Respondent's exceptions and affirm the Judge's findings and conclusions concerning the credibility of Respondent's witnesses and Respondent's coercive conduct.

### **IV. ARGUMENT**

#### ***A. Credibility***

The Board accords significant weight to the credibility determinations of administrative law judges because they actually see and hear witnesses when testifying. See *Medeco Security Locks*, 322 NLRB 664, 664 (1996) (“[C]redibility is a function not only of what a witness says but of how a witness says it.”) (citation omitted). The judge may consider “[a]ll aspects of the witness’s demeanor” in evaluating truthfulness, “including the expression of [the witness’s] countenance, how he sits or stands, whether he is inordinately nervous, his coloration during examination, the modulation or pace of his speech and other non-verbal communication.” *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996) quoting *Penasquitos Village v. NLRB*, 565 F.2d 1074, 1078-79 (9th Cir. 1977).

For purposes of resolving credibility issues, the ALJ may properly consider whether the act of voluntarily testifying in a Board proceeding potentially endangers the witness's economic well-being. The Board has long applied this principle to employees testifying against their current employers. See, e.g., *Shop-Rite Supermarket*, 231 NLRB 500, 505, fn. 22 (1977) (observing that employee testimony that is adverse to the employer is “given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false.”). This logic is also applicable—at least to some extent—to witnesses who testify to their potential detriment against their own union. See, e.g., *Iron Workers Union Local No. 378 (N.E. Carlson Construction)*, 302 NLRB 200, 205 (1991) (finding witness credible “because as a union member and shop steward, he was testifying against union solidarity and his own self-interest” by testifying against the union's business agent); *Machinists District 751 (Boeing Co.)*, 270 NLRB 1059, 1060 (1984) (finding indicium of reliability in witness's status as bargaining-unit member who had nothing to gain from testifying against his own union).

The Board's established policy is not to overrule an administrative law judge's credibility resolution unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (195), *enfd.* 188 F.2d 362 (3d. Cir. 1951). As the Board has observed, “[w]here demeanor is not determinative, an administrative law judge properly may base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole.” *Daikichi Sushi*, 335 NLRB 622, 623 (2001), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003) (internal quotation marks and citations omitted).

***1. The Judge Correctly Found That General Counsel's Witnesses Were Credible (Exception 17)***

A close examination of the credible facts, both disputed and undisputed, the reasonable inferences from those facts, the inherent probabilities of the respective versions of the events and the inconsistencies between Respondent's witnesses in this case as well as between witness testimony and documentary evidence, shows that Judge Giannasi correctly resolved credibility in favor of General Counsel's witnesses and against Respondent's witnesses.

An important factor in assessing a witness's credibility is whether the witness testified in the presence of other witnesses who might tailor their own testimony so as to avoid contradictory statements. In the instant case, unlike Respondent's witness, all of General Counsel's witnesses testified outside the presence of other witnesses. In addition, General Counsel presented testimony from residents with no economic or personal stake in the outcome of the case. Center City One residents Pamela Bona, Adam Klein, Maria Vickers, and Howard Paull consistently testified how each of them could clearly hear the crying baby inside their respective apartments, how the loud noise affected their daily lives, and how they responded to the distressing noise. The fact that residents could hear the crying baby through newly installed energy efficient windows is corroborated by Pamela Bona and Adam Klein. (ALJD 4:37-39; T. 39, 63). Adam Klein also corroborated Bona's testimony that they could hear the crying baby as far north as Broad and Locust streets. (ALJD 5:6-8, 5:20-22; T. 51, 70-72) Both Pamela Bona and Adam Klein's testimony were further corroborated by documentary evidence. (GCX-14; GCX-17); *International Harvester Co.*, 226 NLRB 166, 168, fns. 11, 12 (1976) (crediting witness testimony where corroborated and discrediting witness testimony when uncorroborated); *West Irving Die Casting of Kentucky, Inc.*, 346 NLRB 349, 352 (2006) (finding witness testimony not credible where uncorroborated).

Indeed, all of General Counsel's witnesses who reside at Center City One were highly credible witnesses and candid in their answers to questions. Judge Giannasi correctly found that they were "neutral and disinterested" witnesses whose testimony was "mutually corroborative, credible and reliable." (ALJD 4:43-45) As non-party witnesses, the residents have no vested interest in the matter. In fact, most of the residential witnesses testified that they supported the Union. (ALJD 4:43-44; T. 47; 161) In her email to City Council members Squilla and Johnson and to Mayor Kenney, Bona stated that she was not "opposed to unions or question the right to protest. The union rat is recognized as a protest against nonunion labor. Living along Avenue of the Arts, we are familiar with calls and changes of protests, which last for hours or a day – rarely longer. However, the recording that blasts for many hours daily...is an unacceptable disturbance of our community's right for peace." (GCX. 14). Howard Paull testified that he had no objection with Respondent's right to protest but their means was extreme. (T. 152) Maria Vickers testified that she informed John Donohoe that she was a supporter of the union, as her father was a card carrying member of the carpenters union, but their method with the crying baby was not making friends with people like her who supported their cause. (T. 161)

The Judge correctly credited the testimony of each Post Brothers Representative Patrick Steffa, Brandon Byrd, and Vitali Vasilevich. All three witnesses remained sequestered during the hearing and answered questions consistently, readily and directly throughout their testimony. Almost all of their testimony was unrebutted by Respondent. In contrast, Brian Eddis, Respondent's agent and designated representative, remained throughout the hearing and was able to hear all the testimony prior to his testimony on behalf of Respondent. In contrast to the unreliable and unimpressive demeanor exhibited by Eddis and Donohoe, Steffa remained steadfast on both direct and cross-examination without be evasive or argumentative. Steffa's testimony was

straightforward and believable, corroborated by video evidence and based on his truthful demeanor. (ALJD 10:15-16) Steffa's testimony regarding his conversations with Gary Everly was corroborated by video evidence. GCX-3(a), 3(b). (ALJD 6:20-23) Steffa's testimony that he could hear the noise of the crying baby inside the Atlantic Building is corroborated by Vasilevich. (ALJD 4:7-9, 4:30-32; T. 120-121, 201)

Byrd's testimony remained completely un rebutted by Respondent. Byrd testified that he saw residents and pedestrians walk up to John Donohoe and the other Union representatives to complain about the crying baby. (T 169, 171). Byrd also testified that he witnessed John Donohoe raise the volume of the crying baby for a few seconds every other day, while stating "now that's loud" (T. 175) In fact, Donohoe corroborated Byrd's testimony when he admitted to raising the volume, or making "quick adjustments," after people questioned him about the crying baby. (T. 175-176, 286-287) The Judge correctly credited Byrd's testimony, whose testimony remained intact, was consistent and more credible than Donohoe or Eddis.

The Judge correctly credited Vitali Vasilevich's uncontradicted testimony about the difficulties he had communicating with drivers for deliveries and relocating subcontractors to work in other areas due to the volume of the crying baby. (ALJD4:28-32) In key respects, he corroborated Steffa's testimony that he could hear the crying baby while working inside the Atlantic Building and Byrd's testimony that residents complained to the Union about how they could hear the crying baby inside their apartment. (T. 120, 173, 198-199, 203)

***2. The Judge Correctly Found That Respondent's Witnesses Were Not Credible (Exception 17)***

In stark contrast to General Counsel's witnesses, the Judge correctly found that Respondent's witnesses, Brian Eddis and John Donohoe, were not credible. (ALJD 7:8-10) Based on their overall demeanor and contradicting testimony, the Judge properly found that Eddis and

Donohoe were unreliable witnesses, lacking candor and credibility. (ALJD 7:8-14) Their testimonies were inconsistent, self-serving and at times, implausible, especially since their own text messages revealed the Union's true motive behind blasting the crying baby. (ALJD 8: 21-24) Contrary to Respondent's assertion, Respondent did not use the crying baby as a means to capture people's attention to the Union's handbill but raised the volume to intentionally interfere with the operations of Post Brothers and other neutrals. (ALJD 7:17-20) On the evening of September 18, 2018, John Donohoe texted Brian Eddis,

**We did good today  
We got to the and that's what  
we want to do  
I can just imagine how pissed they were last night w the  
Volume on 7 lol**

Eddis responded,

**LOL!! People were seriously  
Crying...it was way more  
contentious yesterday...Steffa  
was not taking it well...along  
with me going back & forth**

(ALJD 7:25-32; GCX-21, p. 7). The text messages indicate that Respondent was "not trying to attract people's attention" but to punish Steffa and Post Brothers. (T. 260-261) On cross-examination, Eddis could not explain what was so funny about turning the volume up to 7 or that it was making people cry. (T. 260-261) Eddis attempted to distance himself unsuccessfully from the text message by saying that he "was happy that we were able to get people's attention." (T. 261) Eddis' only defense was, "I wouldn't say that I was pleased that it was turned up to volume 7," even though his testimony directly contradicts what he wrote in his text message. (T. 261)

Eddis testified that the crying baby was very successful in getting people to take the Union's handbills. (T. 261) Yet, Eddis could not explain why the Union did not continue using the

crying baby if it was so successful in getting people's attention. (T. 262) Respondent asserts that Eddis and Donohoe were cooperative during cross-examination, admitting that they received complaints from pedestrians. However, Respondent's characterization is not accurate. In fact, on cross-examination, Eddis was evasive and only after General Counsel played each video evidence did he reluctantly agree that numerous pedestrians and residents refused to take the handbills, that they were annoyed by the crying baby, and that they were complaining to the Union about the crying baby. (T. 262-266; GCX 4(a), 5, and 23). Eddis also testified that he did not believe that Gary Everly with Air Management had decided about any violations on September 18, 2018. (T. 244) However, his testimony is again contradicted by his own text messages. Eddis sent Donohoe a text message on the evening of September 18, 2018 that "We're appealing the violation accordingly." (GCX 21, p. 5). If a violation was not found, there would be no reason for an appeal. Eddis' text message also corroborates Steffa's testimony that he believed Air Management was initially going to find a violation but then changed its mind. (T. 115)

The Judge correctly determined that Donohoe's overall demeanor was not credible, finding that he was often curt in his answers and exhibited a unique lack of candor. (ALJD 7:12-14) Donohoe was argumentative and cagey during cross-examination. On direct examination, Donohoe testified that he was not "aware of" being present on any other dates except the one listed on the Log-In Sheets admitted as GCX-6(a)-(h). (T. 280). However, Donohoe's testimony is contradicted by record evidence. It is undisputed that John Donohoe was present on multiple dates besides the eight days listed on the Log-In Sheets, including October 18, 2018 and October 19, 2018. (JT-1; T. 281; GCX-23) Donohoe admitted that he supervised the handbillers, yet he would not confirm his attendance on October 18<sup>th</sup> and October 19<sup>th</sup> on cross examination despite the record evidence, including video evidence. (T. 279; GCX-23)

John Donohue and Brian Eddis repeatedly contradicted each other further damaging their credibility. Eddis testified that the Union lowered the volume of the crying baby to Volume 4 on September 18, 2018 after speaking with Air Management Representative Gary Everly. (T. 284) Eddis testified that Gary Everly instructed the Union to turn down the volume on September 18, 2018 and to set it at 4. (T. 284-285). Donohue, on the other hand, testified that on September 18, 2018, he set the volume at 4 from the beginning before Air Management arrived and that he was never instructed by Air Management that the volume was unacceptable. (T. 285, 288) In addition to contradicting Eddis' testimony, Donohue contradicted himself regarding the volume of the crying baby. On direct examination, Donohue testified that he did not know what volume the recording was being played after he dropped off the equipment on September 17, 2018. (T. 284). However, his text message to Brian Eddis in GCX-21 demonstrated that he did know the volume of the recording when he wrote, "just imagine how pissed they were last night with the volume on 7." (T. 294, 296)

In addition, Donohue testified that he may have adjusted the volume "once or twice" on September 18<sup>th</sup> and 19<sup>th</sup>. (T. 286) Donohue admitted on direct examination that he adjusted the volume higher after pedestrians questioned why he was there to show them how much louder it could be (T. 286-287). The fact that Donohue raised the volume in response to pedestrian complaints demonstrates that Respondent was not there to educate the public but to punish Post Brothers and anyone else who wanted Respondent to stop playing the crying baby. Even after admitting on direct examination that he raised the volume, on cross-examination, Donohue repeatedly refused to directly answer General Counsel's question whether he raised the volume above 4. (T. 298-299) Donohue's repeated attempts to qualify his answer and refusal to simply answer "yes" illustrates his evasiveness and complete lack of credibility.

John Donohoe's arrogant attitude about how he only received one or two complaints about the crying baby was ingenuous and implausible. (T. 290) To contradict his direct testimony, General Counsel played GCX- 4(a), 5 and 23, which clearly showed pedestrians and residents who were deeply disturbed by the crying baby. Yet, on cross examination, Donohoe repeatedly refused to directly answer General Counsel's question about whether those pedestrians and residents were happy about hearing the crying baby. (T. 302) Donohoe's cavalier attitude remained steadfast even when he was confronted with video evidence in GCX-23 dated October 19, 2018 where he is seen visibly arguing with a pedestrian about the crying baby. (T. 302) After playing GCX-23, General Counsel asked Donohue whether that was another passerby who was not happy about the screaming baby and Donohue replied, "I don't know." (T. 302) When pressed further on cross-examination, instead of replying "yes," Donohue kept trying to qualify his response by stating, "He doesn't look happy. But I don't – I don't agree with you" or "all I can recall is one or two complaints." (T. 303-304)

Center City One resident 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) Paull's testimony concerning this interaction was unrebutted by Respondent and further damages Donohoe's credibility that he only got "one" or "two" complaints about the noise.

Therefore, the Board should reject Respondent's exceptions and affirm the Judge's credibility determinations.

**B. *The Judge Correctly Found That the Amplified Volume of the Crying Baby Recording Was Set at a High Volume (Exceptions 1, 2, 11).***

The Judge found that the amplified volume of the crying baby recording was often set above 4 and likely at 7 during the protest<sup>8</sup>. (ALJD 7:41-42) Respondent argues that the Judge made factual errors unsupported by the record regarding the high volume of the recording. Contrary to Respondent's assertions, there is sufficient evidence in the record to support the Judge's finding that Respondent played the recording of the crying baby at a high volume. The Judge based his findings on his viewing of the videos of Respondent's conduct, the uncontradicted testimony of General Counsel's witnesses<sup>9</sup>, and the lack of credibility of Respondent's witnesses.

Respondent agent Brian Eddis admitted that the recording baby was set at a "very high volume" on the first day, setting at level 7. (ALJD 3:30-32). Respondent argues that the volume was only set at 7 the first day and at volume 4 all the other days because there was no witness testimony that the volume was set at 7 on other days. Respondent would have the Board believe that the witnesses generally agreed that the volume remained consistent throughout the protest period<sup>10</sup>. However, Respondent's factual characterization and argument is without merit. All of General Counsel's witnesses testified about the loudness of the crying baby recording; they did not agree or testify that the volume remained at 4 during the entire time. By crediting the

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<sup>8</sup> Exception 1 asserts that the Judge incorrectly found that the "volume was often set well above level 4 and likely at 7, as it was on the first day of the protest." (Exceptions 1, ALJD 7:41-8:6; 9:-18-20). Exceptions 2 and 11 asserts that the Judge improperly concluded that "Respondent intentionally set the speakers in such a way as to interfere with or even disrupt operations at the Broad Street site" and "manipulate the volume of the recording and even the direction of the speakers to avoid proper reading by the authorities." (Exceptions 2, 11; ALJD 8:19-21; 9:23-27; 12:6-7).

<sup>9</sup> Respondent primarily attacks the credibility of Steffa and does not attack the credibility of the Center City One residents, Brandon Byrd or Vitali Vasilevich.

<sup>10</sup> Respondent did not cite the testimony of any of General Counsel's witnesses except Patrick Steffa. Steffa did not testify that the volume stayed at 4 during the entire protest. Steffa only testified that the volume did not change on September 19, 2018 after Air Management visited.

uncontradicted and credible testimony of General Counsel's witnesses, the record evidence supports the Judge's factual finding to conclude that Respondent played the recording of the crying baby at a such a high volume not just on the first day, but each time Respondent played the recording. The volume was so high that it could be heard inside the Atlantic Building during construction work and pedestrians had to cover their ears as they passed. (ALJD 3:35-36, 3:39-40; 4:1-2). Steffa testified that he could hear the crying baby inside the building near the bathroom on the fifth floor. (ALJD 4:5-9) Security Guard Brandon Byrd witnessed pedestrians plugging their ears, was forced to wear ear plugs, and heard the crying baby on his way home in the underground subway. (ALJD 4:11-19; T. 178, 181; GCX-13). Vitali Vasilevich could not have a conversation with someone on the phone and had to use hand gestures to communicate with delivery drivers. (ALJD 4:25-30) The most compelling testimony came from the residents of Center City One. The fact that these residents could hear the crying baby recording as high as the 23<sup>rd</sup> floor, and even on the South side of Center City One speaks volume. Bona, who called police to complain about the noise, testified that the volume of crying baby increased after the police left. (ALJD 5:5-6;T. 40-41) The record evidence is sufficient for the Judge to have found that the volume was so loud, based on witness and video evidence, that it was set above 4, likely at 7, especially since Respondent's witnesses admitted that the volume had been at 7.

The Judge correctly discredited the contradicting testimony of Eddis and Donohue regarding the volume of the recording and is supported by record evidence. For example, Eddis testified that on the second day of the protest, the volume was lowered from 7 to 4 after speaking with Gary Everly with Air Management. (ALJD 6:37-39) Donohoe, however, testified that the volume remained at 4 and the volume did not change before and after Everly arrived. (ALJD 6:41, 7:1-3;T. 280) Respondent would also have the Board ignore the text messages exchanged between

Eddis and Donohoe. However, Respondent's own written words confirm that Respondent's motive behind playing the crying baby was not to inform the public but to disrupt Post Brothers' operations. Their testimony lacked credibility that the noise level remained low and almost never changed. (ALJD 8:4-6). The record evidence further supports the Judge's finding that Respondent intentionally set the speakers to interrupt Post Brothers' operation. The Judge correctly credited the testimony of General Counsel's witnesses that the speakers were almost always facing the entrance of the Broad Street site. (ALJD 8:8-10) Similarly with the volume, Eddis and Donohoe contradicted each other regarding the placement of the speakers. Donohoe testified that the speakers always face the Atlantic Building, whereas Eddis testified that the direction of the speakers changed regularly for no particular reason. (ALJD 8:12-16). The Union's manipulation of the speakers is confirmed by their own written words when Donohoe said when Air Management shows up the next day, they would "Position the speakers away from the building so that the reading across the street will be higher and benefit us when they take close reading." (GCX-21; ALJD 8:17-19)

Therefore, the Board should reject Respondent's exceptions and affirm the Judge's findings and conclusions regarding the volume of the crying baby recording.

**C. *The Judge Correctly Found That the Air Management Reports Were Not Reliable and the Noise Level Was in Violation of the City's Noise Regulations (Exceptions 3, 4, 5)***

Respondent submitted two Inspection Reports as R-1 and R-2 dated September 18, 2018 and September 19, 2018 written by Gary Everly. For the September 18, 2018 report, Everly indicated that readings "cannot be used for compliance due to weather conditions." (R-1). On September 19, 2018, Everly also did not find a violation with the decibel readings. The Judge correctly determined that the Air Management Reports were not reliable and in fact exceeded the

volume permitted under the City Ordinance<sup>11</sup>. Contrary to Respondent's assertions, there is ample evidence to support the Judge's findings and conclusions.

The Judge credited Steffa and relied on Everly's admission that he did not find a violation on either date because he wanted Respondent to be able to protest, which was recorded on video in GCX 3(a).<sup>12</sup> Patrick Steffa asked Everly why he was refusing to enforce the law when they were 20 decibels above, Everly clearly stated: "because I want them to be able to protest." (GXC- 3(b); T. 95) Believing that Everly was purposely not taking correct decibel readings, Steffa took a picture of Everly's decibel meter admitted as GCX-15. (T 104). GCX-15 shows Everly's meter reading to be 93.1, not "78.5-80.0 dBa" which Everly noted in his Inspection Report in R-2. Steffa's credible testimony and Everly's admission attacks the validity of the decibel readings taken by Everly to show that Air Management would have found a violation but for the fact that Everly wanted the Union to be able to protest.

General Counsel did not contest the admissibility or authenticity of the Inspection Reports. (JT-1) However, the General Counsel argued during the hearing that the reports were not reliable based on GCX-3(a), GCX-15 and Steffa's testimony. (T. 105-106) Respondent cannot argue that they were unaware or surprised that Everly's statements would be introduced at trial. General Counsel provided a copy of GXC-3(a) (video recording of the conversation between Steffa and

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<sup>11</sup> Respondent contends that the Judge improperly concluded that the Air Management "reports have no reliability in determining the real noise in this case" and that the volume used for the time covered by the reports differed from the remainder of the protest. (Exceptions 3, 4; ALJD 8:41-42, ft. 9) Respondent further argues that the Judge incorrectly found that "the noise level here was in violation of [] Philadelphia's noise regulations." (Exception 5; ALJD 11:42-44)

<sup>12</sup> Steffa testified that Everly showed up on or about September 18, 2018 when he believed the Union first showed up. (T. 83, 89) Steffa also testified that he believed the video admitted as GCX 3(a) was also taken on the first day Everly showed up even though the video is dated September 19, 2018. Whether the video was taken on the first or second day Everly appeared on site does not detract Steffa's testimony and Everly's statement that Everly wanted the Union to be able to protest.

Everly) in advance of the hearing to Respondent, along with a transcript of the recording (GXC-3(b). Respondent stipulated to the authenticity of both the video evidence and transcription admitted as GCX-3(a) and 3(b). (JT-1) During the hearing, Respondent did not raise any objections to the admissibility of both GCX-3(a) and 3(b), including any hearsay objections to the statements made by Everly in the video or the transcript. When the issue arose during the hearing regarding the accuracy of the reports, Respondent could have called Gary Everly as a witness but did not. (ALJD 9:3-4; T. 106) Therefore, the Judge correctly credited Steffa and relied on Everly's admitted statement that he wanted to the Union to be able to protest to conclude that the reports were not reliable. In addition, Everly's report on Sept. 18<sup>th</sup> only indicates that the readings could not be verified because of weather. The Judge correctly relied on Steffa's credible testimony, video and documentary evidence, and Respondent's admission in the text messages to conclude that Respondent played the crying baby recording at a high volume on September 17<sup>th</sup> and 18<sup>th</sup> that would have violated the City Ordinance; with respect to the September 19<sup>th</sup> report, the Judge only found that the report was unreliable. (ALJD 9:23-24) The key factors on September 17<sup>th</sup> is Respondent's admission that the recording was level 7, and on September 18<sup>th</sup>, Everly's admission that Respondent was out of compliance to support the Judge's findings.

As the Judge properly noted in his decision, both Air Management Reports have no reliability regarding the overall noise levels during the entire protest period. Rather, the reports are only a snapshot of what occurred for a few hours on September 18<sup>th</sup> and September 19<sup>th</sup>. (ALJD 8:41-42, 9:1-3) The mere fact that Air Management did not find a violation on two days does not mean that Respondent was not violating the ordinance on other days. General Counsel's witnesses support the Judge's finding that on many occasions, the noise level was loud enough to interfere with the operations of Post Brothers and other neutrals at the Broad Street site. (ALJD 9:24-27)

The Air Management Reports are further tainted by the fact that both Patrick Steffa and Respondent's witnesses believed that Air Management initially found a violation on Everly's first visit. Steffa's testimony is corroborated by text messages between Brian Eddis and John Donohoe. (T. 115; GCX-21) Brian Eddis texted Donohue on the evening of September 18, 2018, "We're appealing the violation accordingly. We're appealing the violation due to an agreement made earlier in the day with Sgt. Gary from civil affairs related to us what our volume was to be set at." (GCX-20, p. 4-5) Even Respondent believed that Everly initially found a violation despite Everly's inspection reports. Therefore, the Board should reject Respondent's exceptions and affirm the Judge's findings and conclusions regarding the Air Management Reports and violations under the City Ordinance.

**D. *The Judge Correctly Found that Brian Eddis Impliedly Threatened to Set Fire the Property of Post Brothers' Representative Patrick Steffa (Exceptions 6, 7, 15, 16 and 18)***

The Judge correctly credited Steffa's testimony over Eddis to find that Eddis' implied threat violated Section 8(b)(4)(ii)(B) of the Act. Respondent argues that the Judge made factual findings unsupported by the record and made errors of law regarding the threat allegation. Respondent also argues that the Judge erred by finding that "Eddis did not refute Steffa's testimony about the recent fire near Steffa's bar" (Exceptions 6; ALJ 10:9-11) Respondent contends that Eddis did specifically deny any threat to Steffa regarding a fire. Respondent's argument is misplaced. There is a difference between denying whether Eddis made any statements about a fire and Steffa's bar versus denying whether Eddis had knowledge that a bar down the street from Steffa's bar had burnt down a year before. The Judge found that Eddis did not refute having knowledge that a bar near Steffa's had recently burnt down. Respondent's counsel only asked Eddis, "Did you say anything to him that day about setting a fire or implying that you might set a

fire?” (T. 240) Eddis only denied making any direct statements to Steffa about a fire, or that he would set fire to Steffa’s bar. Respondent’s counsel did not ask Eddis, “Did you know that a bar down the street from Steffa’s had burnt down?” By not asking this question, Eddis did not refute Steffa’s testimony that a bar near his business had burnt down a year earlier. Therefore, the Judge correctly found that Eddis did not deny having knowledge that a bar near Steffa’s establishment had bunt down a year earlier.

Next, Respondent argues that the Judge erred by finding that “Eddis [did not] deny telling Steffa that, if Major Electric left, so would the recording of the crying baby” by attributing Respondent’s admitted secondary object to credit Steffa’s testimony. (Exception 7; ALJ 10:9-11) Again, Respondent’s argument is misplaced. Steffa’s testimony regarding Eddis’ statement remains unrebutted simply because Respondent’s counsel did not ask Eddis whether he made the statement to Steffa. Steffa had testified that Donohoe made a similar statement to him that the crying baby would go away if Major Electric went away. (T. 119). Unlike Eddis’ testimony, Respondent’s counsel asked Donohoe whether he made this statement, allowing Donohoe to refute the statement on direct examination. (T. 290) Respondent’s counsel failed to ask Eddis the same question. Therefore, the Judge correctly found that Eddis made the statement about Major Electric on the same day that Eddis made the implied threat about Steffa’s bar being harmed. (ALJD 13:25-29)

Respondent further asserts that Steffa’s testimony over Eddis’ threat should not be credited because it did not conform with the evidence in the record, or lack of evidence. Respondent argues that Steffa’s testimony should not be credited by shifting the blame on Steffa. In other words, there was no implied threat because Steffa took no action immediately after the statement, including calling over a guard or filing a police report. To the contrary, Steffa did take action to protect what

was threatened and increased security at his bar by installing cameras. (T. 128). The Judge did not find that Eddis threatened Steffa with immediate physical or personal harm warranting other action. Rather, the Judge correctly found that Eddis' statement that "fires happen all the time" impliedly threatened to cause harm or physical harm to a business property owned by Steffa, if Post Brothers did not cease doing business with Major Electric.

Respondent's primarily argues that the Judge erred in crediting Steffa's overall testimony over Eddis. For the reasons previously argued in this Brief, the Judge correctly credited all of General Counsel's witnesses over Respondent's witnesses. With respect to the threat, the Judge correctly discredited Eddis who repeatedly contradicted himself during his testimony. (ALJD 10:18-20) Eddis testified that Steffa "was trying to engage quite a bit." (T. 239) However, Eddis' own text messages contradict his direct testimony. Eddis, not Steffa, was the instigator by his own admission when he stated "Steffa was not taking it well," especially since Eddis admitted going back and forth with Steffa in the text message. (GCX 21, p. 7) It is undisputed that Eddis knew Steffa owned a bar in Bridesburg named Krick Wuder bar. (ALJD 10:6-7; T. 240) Eddis also contradicted himself when asked whether he made any reference to Steffa's bar. When Respondent's counsel first asked, "Did you make any reference to his bar in Bridesburg?" Eddis responded, "Yes... I was well aware of the bar." (T. 240) When Respondent's counsel asked him again, "Did you make any referenced to his bar specifically?" Eddis changed his answer and replied, "No." (ALJD 10:8-10; T. 241) Eddis' contradicting testimony severely questions the veracity of Eddis' overall testimony concerning the implied threat to Steffa that fires happen all the time in Bridesburg.

Lastly, Respondent objects to the Judge's legal conclusion that Eddis' threat was sufficiently related to the admitted secondary objective and that "there was at least an implied

threat of physical harm or harm to the property of a representative of a neutral to the Respondent's dispute at the Broad Street site" amounting to coercion under Section 8(b)(4)(ii)(B) of the Act. (Exceptions 15 and 16; ALJD 13:4-31, 14:14-16). It is well settled Board law that threats of physical violence in order to coerce a neutral to cease doing business with a nonunion contractor violates Section 8(b)(4)(ii)(B). *Plumbers and Pipe Fitters Local No. 142 (Shop-Rite Foods, Inc.)*, 133 NLRB 301, 314 (1961) (statement to employer that continued use of nonunion refrigeration company could result in "a lot of trouble, worry, and headaches and that there might be "knots in some heads" constituted threat of economic retaliation and possible violence in violation of Section 8(b)(4)(ii)(B)); *Union de Tronquistas de Puerto Rico, Local 901 (F.F. Instrument Corp.)*, 210 NLRB 1040 (1974) (threatening statements to employer's general manager that nobody would be allowed in or out of the plant and the union could not be responsible for anything happening to the employer's employees outside the plant violated Section 8(b)(4)(ii)(B)); *Teamsters Local 85 (Victory Transportation, Inc.)*, 180 NLRB 709 (1970), *enfd.* 454 F.2d 875 (1972) (statement amounting to threat of physical harm violated Section 8(b)(4)(ii)(B)). Accordingly, the Board should reject Respondent's exceptions and affirm the Judge's findings and conclusions that Respondent's agent impliedly threatened harm or physical harm to Steffa's property as an independent violation of Section 8(b)(4)(ii)(B) of the Act.

***E. 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.<sup>13</sup> *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 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.<sup>14</sup> *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

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<sup>13</sup>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).

<sup>14</sup> *See also Eliason & Knuth*, 355 NLRB at 815 (Members Schaumber and Hayes, dissenting).

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).

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)*, 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).<sup>15</sup> 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.*

***F. In the Sphere of Labor Relations, the Government Has a Substantial Interest in Justifying Some Restraints on First Amendment Freedoms (Exception 12, 13, 18)***

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

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<sup>15</sup> 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 (also known as the *Catholic Bishop* rule<sup>16</sup>) 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

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<sup>16</sup> *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)

acknowledged that if a union *did* engage in commercial speech, that speech would be entitled to lesser constitutional protection. *Id.*

***G. The Judge’s Findings and Conclusion that Respondent’s Conduct Violated 8(b)(4)(ii)(B) Do Not Implicate First Amendment Concerns (Exception 12, 13, 18)***

Respondent argues that the Board should invoke the *Catholic Bishop* rule to avoid First Amendment concerns because the Union’s conduct did not cross the line from expression to confrontation or coercive conduct under *DeBartolo II* and that a violation must be more than an attempt by a union member to convey a message<sup>17</sup>. This case is not a First Amendment issue or about peaceful handbilling. This case is about Respondent blasting a recording of crying baby that was so loud it interfered with work performed by Post Brothers and other neutrals at the Broad Street site, that it could be heard from blocks away and in the underground subway, that caused pedestrians and residents to confront the Union to complain about the noise, and that it could be heard all the way to the 25<sup>th</sup> floor of a residential building even with newly installed double pane windows and doors.

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

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<sup>17</sup> Respondent excepts to the Judge finding that the recording was not protected by the First Amendment and by refusing to apply the *Catholic Bishop* rule to find that the Union violated Section 8(b)(4)(ii)(B) of the Act; Respondent objects to the “ALJ’s conclusion violating the First Amendment as applied by finding that the Union violated Section 8(b)(4)(ii)(B) of the Act.” (Exceptions 12 and 13) (ALJD 12:22-41)

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).

Respondent cited *Startzell v. City of Philadelphia*, 533 F.3d 183, 199 & n. 10 (3d Cir. 2008) to argue that “amplified speech” through the use of bullhorns is protected expression under the First Amendment and *Ward v. Rock against Racism*, 491 U.S. 781 (1980) to argue that music is a protected form of expression and communication. However, Respondent’s reliance on these cases are misplaced since courts have repeatedly found in favor of placing limits on amplified speech. In *Startzell*, the Third Circuit found that appellants’ use of microphones and bullhorns to drown out and interfere with gay pride events and to directly confront a transgendered individual was not protected speech. The Court found that the City’s action to remove and restrict appellant’s movements “were justified, reasonable, content-neutral regulations of the time, place, or manner of their expression.” *Id.* at 199, 203. “[T]he First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.” *Id.* at 202 citing *Heffron v. Int’l Society for Krishna Consciousness*, 455 U.S. 640, 647 (1981). The Third Circuit further found that appellants had alternative ways to express themselves without causing disruption, including distributing leaflets and using smaller signs without the use of bullhorns. *Id.* at 202. The Supreme Court in *Ward* also determined that limitations on sound amplification was valid as “a reasonable regulation of the place and manner of expression.” *Ward*, 491 U.S. at 803 (sound amplifications can be limited to control noise levels at bandshell events at New York’s Central Park).

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. Therefore, 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, the Judge 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 properly 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 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, the Board should reject Respondent's exceptions based on First Amendment arguments and affirm the Judge's findings and conclusions that Respondent's use of an amplified recording of a crying baby at an excessively loud volume was coercive conduct and interfered with the operations of Post Brothers and other neutrals working inside the Atlantic Building in violation of Section 8(b)(4)(ii)(B).

***H. The Judge Correctly Concluded that Respondent’s Use of an Amplified Recording of a Crying Baby was Coercive Conduct Violating Section 8(b)(4)(ii)(B) of the Act (Exceptions 2, 8, 9, 10, 14, 18, 19)***

The Judge correctly found that Respondent’s use of an amplified speaker to broadcast the crying baby at excessively loud volumes from September 17, 2018 through October 19, 2018 was unlawfully coercive and violated Section 8(b)(4)(ii)(B)<sup>18</sup>. Respondent argues that the Judge erred in finding that “Respondent’s repeated use of the crying baby recording at an excessive volume meets the Board’s definition of coercion in *Eliason* and thus violated Section 8(b)(4)(ii)(B).” (Exception 8; ALJD, 11:19-23) Respondent’s argument is without merit. The Board has found non-picketing conduct to be coercive “when the conduct directly caused, or could reasonably be expected to directly cause, disruption of the secondary’s operations” *Eliason & Knuth*, 355 NLRB at 805. More importantly, the Board already found in *Society Hill Towers* that broadcasting a message at extremely high volume through loudspeakers is coercive conduct in violation of Section 8(b)(4)(ii)(B) of the Act. *Society Hill Towers*, 335 NLRB 814.

In light of the Board’s controlling decision in *Society Hill Towers*, Respondent argues that Judge erred when he refused to distinguish *Society Hill Towers* from the facts of this case and wrongly concluded that Respondent’s audio recording “had no purpose but to interfere with the neutral employers working at the Broad Street site.” (Exceptions 9 and 10; ALJD, 11:21-12:33; 12:27-31). Respondent’s argument is without merit. The Judge correctly applied the Board’s decision in *Society Hill Towers* to find that Respondent’s conduct violated Section 8(b)(4)(ii)(B). In *Society Hill Towers*, the Board found against a union for using a sound system at excessive volume levels to broadcast its area standards message about the use of a non-union contractor at

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<sup>18</sup> 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).

the neutrals' residential apartment buildings and condominium complex. The Board found that the excessive volume of the message interfered with the use of private facilities by patrons and tenants of neutrals and therefore violated Section 8(b)(4)(ii)(B).

Respondent argues that *Society Hill Towers* is distinguishable because Respondent, in the instant case (unlike the employers in *Society Hill Towers*), did not exceed noise levels permitted by the City of Philadelphia, did not play the recording at night or on weekends, and did not use spotters to signal to its agents to reduce the volume or stop broadcasting before Air Management officials arrived<sup>19</sup>. *Society Hill Towers*, however, is not distinguishable, but completely applicable. *Society Hill Towers* did not rely on the finding of noise violations<sup>20</sup> found by the City of Philadelphia against the union to find unlawful 8(b)(4)(ii)(B) coercion, but rather on the impact of the excessive noise on the neutrals and the people patronizing or using the neutral's facility or premises at *Society Hill Towers* and *The Versailles*. *Society Hill Towers*, at 826-829. Residents of *Society Hill Towers* testified that when the union broadcasted its message, the text of the message was unintelligible and the noise was so loud, residents had difficulty talking on the phone or were woken up by the noise; residents made numerous complaints about the amplified sound to their building and police; and residents could not use the outdoor facilities because of the noise. *Id.* at 821-822. In addition to *Society Hill* residents, non-residents who lived and worked across the street testified about the impact of the noise in their home and business. *Id.* at 822. These facts alone are

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<sup>19</sup> Respondent highlights the violations found in *Society Hill Towers* to factually distinguish that case from the instant case. However, Air Management was called "probably 50 times" in *Society Hill Towers*; in the instant case, Air Management only came twice and refused to come back despite requests from Steffa. *Society Hill Towers*, 335 NLRB at 822; (T. 118-119)

<sup>20</sup> At the time of the decision, the union had appealed the citations issued by Air Management, and there was no final adjudication of the issues under the Philadelphia ordinances. *Society Hill Towers*, 335 NLRB at 826.

strikingly similar to the testimony of Center City one residents, Vitali Vasilevich, and Patrick Steffa.

In the instant case, multiple residents of Center City One Condominiums testified how they could hear the loud, piercing noise of the crying baby in their apartments and how the noise affected them. Here, the noise was so loud that residents (not from the Atlantic Building where Respondent was stationed) but residents from a condominium across Broad Street and a half block East on Spruce Street heard the crying baby inside their residence. Even though the Center City One residents did not live in the building where the union directed the amplified sound, they could still hear the noise across Broad Street and even on the other side of the apartment building. These residents lived on multiple floors ranging from as low as the 9<sup>th</sup> floor to as high as the 25<sup>th</sup> floor. (T. 39, 63, 136, 155) They lived in apartments facing both the North and South side of Broad Street. Each resident testified how clearly they could hear the crying baby in their apartments with their windows and doors closed, including those with newly installed, energy efficient windows.

The loud noise of the crying baby also impacted the residents in different ways: one resident who worked late at night was woken up several times by the crying baby; another resident was forced to drown out the noise by blaring music in his own residence; two residents heard the crying baby while they were trying to work at home, forcing them to either end early or leave their residence to work elsewhere; residents heard the crying baby while unsuccessfully attempting to talk on the phone inside their apartments; residents were so profoundly affected by the crying baby that at least three residents contacted the police, the Mayor of Philadelphia, and their City Council Representative to complain about the incessant noise. (T. 38, 40-41, 62, 68, 138-139, 156) In addition to residents, subcontractors working in the Atlantic Building were so disturbed by the

noise of the crying baby that Post Brothers had to relocate them to other areas in order to avoid constant noise. (ALJD 4:30-32)

Even Respondent's own witnesses admitted that the recording of the crying baby was broadcasted at high volumes on several occasions. It is undisputed that on September 17, 2018, Respondent blasted the recording of the crying baby at volume 7 for several hours that day. (ALJD 6:37-38; T. 238) It is also undisputed that Respondent raised the volume of the crying baby on at least two occasions after receiving complaints from pedestrians or residents. (T. 286-287) Respondent argues that the Judge failed to distinguish Respondent's "ordinary and non-coercive conduct" and that there was no evidence of disruptive intent. (See Respondent's Brief p. 16-17) Amplifying a recording of a crying baby at a high volume is not ordinary conduct but is intentional noise (not speech) intended to disrupt the operations of Post Brothers and other neutrals.

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)

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 that delivered 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.

Respondent also cannot argue that its coercive conduct had no disruptive effect or lacked confrontation. There is ample evidence in the record to show the impact the amplified recording of the crying baby had on Post Brothers and other neutrals, including 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). Resident Paull was also woken up by the crying baby and was forced to leave his apartment because he could not have a phone conversation for work without being interrupted by the crying baby. (T. 138-139) 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 with neutrals.

Respondent's assertion that Post Brothers did not suffer any economic impact is another failed argument. Respondent argues that Post Brothers did not suffer an economic impact because it did not monetarily compensate Center City One residents due to the crying baby recording. The lack of adverse economic impact upon a neutral is not a defense to secondary picketing in violation

of Section 8(b)(ii)(B) of the Act. See *Building Service Employees, Local 254 (University Cleaning Co.)*, 151 NLRB 341, 358 (1965).

Besides *Society Hill Towers*, the Board has found other non-picketing conduct to be coercive within the meaning of Section 8(b)(4)(ii)(B), including interfering with the peaceful use of private facilities. See *Pye v. Teamsters Local 122*, 61 F.3d 1013, 1022-1024 (1<sup>st</sup> Cir. 1995) (finding coercive conduct even without the factor of picketing when union crowded small retail stores using large bills to purchase small items). In *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 746, 750 (1993), *enfd.* 103 F.3d 139 (9th Cir. 1996), a union conducted mass gatherings and engaged in excessive noise activity, including the use of bullhorns, directed at tenants of a building in an effort to get the neutral building owner to cease doing business with a non-union contractor. The Board found that the union's harassment of the neutral tenants violated Section 8(b)(4)(ii)(B). In *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB 638, 638, 680 (1999), *affd.* 52 F. App'x 357 (9th Cir. 2002), a union was found to have engaged in various acts of coercion against neutral employers, including having its members hurl trash bags filled with shredded papers into the lobby of a commercial building. In finding a violation with regard to the trash bags incidents, it was noted that the union staged these incidents with "the certain knowledge that they would inconvenience tenants and others entitled to the peaceable use of the buildings." *Id.* In all these cases, non-picketing conduct was found unlawful under Section 8(b)(4)(ii)(B) because it involved some physical disruption of the neutral employer's premises. See also *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 71-72 (1991) *enfd.* 977 F.2d 1470 (D.C. Cir. 1992) (mass gathering of 50-140 people at motel housing strike replacements and agent who provided those replacements, with shouting and name-calling unlawfully coerced the neutral motel operator to cease renting rooms for the replacements); *Service*

*Employees Local 399 (William J. Burns Agency)*, 136 NLRB 431, 436-37 (1962) (20-70 union members marching in an elliptical pattern without signs while some distributed handbills and two members of the Board majority would, in fact, have labeled the union's conduct "picketing"). 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.

Respondent's entire conduct from September 17, 2018 through October 19, 2018 was unlawfully coercive within the meaning of Section 8(b)(4)(ii)(B). For five weeks, pedestrians and residents who passed by the Atlantic Building or lived in the neighborhood, could not avoid hearing the crying baby for several hours per day, several days per week. The crying baby could be heard clearly and loudly throughout the Atlantic Building while both Post Brothers and its subcontractors were working, even above any construction noise. Accordingly, the Board should reject Respondent's exceptions and affirm the Judge's findings and conclusions that Respondent's conduct in broadcasting a recording of a crying baby at a high volume from September 17, 2018 through October 19, 2018 at the Atlantic Building violated Section 8(b)(4)(ii)(B).

***I. The Judge Issued a Proper Order Regarding Respondent's Coercive Conduct (Exception 19)***

Respondent asserts that the Judge's remedy in the Order fails as unsupported by the record and as a matter of law. General Counsel notes that Respondent has not objected to the specific wording in the Order, including the broader language to prohibit the conduct not just at the Atlantic Building or against Post Brothers "but other persons and the cease doing business object should be prohibited insofar as it applies to other persons besides Major Electric." (ALJD 13:43-14:1); See Respondent's Brief in Support of Exceptions, p. 27, fn. 10) For all the reasons set forth in this

Brief, the Board should reject each of Respondent's exceptions and adopt and affirm the Judge's Order<sup>21</sup>.

## V. CONCLUSION AND REMEDY

For the reasons set forth above, Counsel for the General Counsel respectfully urges the Board to find no merit to Respondent's exceptions and to affirm the Judge's findings, conclusions and Order. The Board should affirm that Respondent 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 a high volume 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. The Board should also affirm the Judge's findings and conclusions that Respondent's Agent impliedly threatened physical harm or harm to the property of a Post Brothers' representative in violation of Section 8(b)(4)(ii)(B).

Respectfully submitted,

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/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](mailto:jun.bang@nlrb.gov)

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<sup>21</sup> General Counsel filed Exceptions to the Judge's finding that Respondent's conduct was not tantamount to picketing and requested the Board to issue an Order with an appropriate remedy including the picketing allegation. Notwithstanding this argument, General Counsel submits that the Judge's Order remedying his finding and conclusions of law was proper and should be affirmed.

