

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

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL
UNION NO. 150 a/w INTERNATIONAL
UNION OF OPERATING ENGINEERS,
AFL-CIO,

CASE NO. 25-CC-228342

Respondent,

and

LIPPERT INDUSTRIES, INC.

Charging Party.

**AMICUS BRIEF OF THE DISTRICT COUNCIL OF NEW YORK CITY & VICINITY
OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA**

INTRODUCTION

Briefly, the current General Counsel of the NLRB is attempting to lead a majority of the Board onto a downward slippery slope toward outlawing under the Act all peaceful non-picketing persuader activity.

This brief is being submitted on behalf of the District Council of New York City & Vicinity of the United Brotherhood of Carpenters and Joiners of America (the “NYC Carpenters District Council”), which is affiliated with the United Brotherhood of Carpenters and Joiners of America (the “UBC”). The NYC Carpenters District Council is the largest building and construction labor organization in the New York City metropolitan area with nearly 20,000 members. It represents a multiplicity of skills,

including but not limited to interior, high-rise concrete, and heavy construction carpenters; millwrights; core drillers; dockbuilders and commercial divers; timbermen; resilient floor coverers; architectural millworkers; and various shop workers in the manufacturing of products used in the building and construction industry.

This brief adopts the factual points and legal arguments made in separate amici submissions by the UBC and the other labor organizations urging the Board to reject the attempt by the General Counsel (the “GC”) to transmogrify lawful First Amendment persuader activity into unlawful picketing, albeit “invisible picketing.”

ARGUMENT

The GC’s true intentions—and the slippery slope down which he wants to take the Board—is revealed in his briefing in this case as well as earlier. Simply put, the GC wants the Board to adopt a worldview unmoored by the modern world and instead one existing in fantasy.

As the Board is aware, here the ALJ decided that the respondent union’s stationary display of a 12-foot inflatable rat and two large banners on public property located near the entrance of an RV trade show, a neutral site, did not violate the Act. The General Counsel filed exceptions to the ALJ’s decision and filed a brief in support of those exceptions, arguing that Eliason & Knuth and Brandon Medical Center should be overruled for essentially the same reasons as he had argued earlier in previous cases. See GC Advice Memorandum,

Summit Design, Case No. 13-CC-225655 (Dec. 20, 2018); GC Brief, Fairfield Inn, Case No. 04-CC-223346 (July 16, 2019).

As in the Fairfield Inn brief, the GC argues here that “in deciding Eliason & Knuth and Brandon II, the Board majority in both cases inappropriately departed from the Board’s previously broad and flexible definition of picketing” by holding that the “‘carrying of picket signs and persistent patrolling’ were necessary predicates to establish picketing.” (GC Brief at 24-25.) The brief approvingly quoted the Eliason & Knuth dissent’s argument that “the sheer size of the banners obviated the need for traditional patrolling because they created a physical, or at least a ‘symbolic[ally] confrontational’ barrier to those seeking access to the neutral’s premises.” (Id. at 27.)

The brief also approvingly cited the Eliason & Knuth dissent’s argument that “since the bannering was tantamount to picketing, no constitutional concerns were raised, as it is settled law that secondary picketing is not entitled to First Amendment protection.” (GC Brief at 27 (emphasis added).) That is true enough because picketing has long been determined to be conduct that can be statutorily regulated while non-picketing publicity has enjoyed First Amendment protection.

Turning to rats, the GC made essentially the same argument, heavily relying on then-Member Hayes’s dissent from Brandon Medical Center:

Member Hayes concluded that the message for “pedestrians or occupants of cars passing in the shadow of a rat balloon, which proclaims the presence of a ‘rat employer,’” was “unmistakably confrontational and coercive.” Id. Member Hayes further determined

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

(GC Brief at 28 (emphasis added).)

So, according to the GC, "invisible picketing" is to be the Board's new standard for finding previously lawful, non-picketing activity as violating the Act and deserving of no First Amendment protection. Will this GC's next atavistic initiative be to advocate outlawing persuader activity using Internet platforms and sites and social media? E.g. Cintas Corp., et al. v. UNITE HERE, et al., 601 F. Supp. 2d 571 (S.D.N.Y. 2009) (district court dismissed a "sprawling 334 paragraph amended complaint larded with seventy-nine exhibits" alleging civil RICO federal coercion claims and Lanham Act intellectual property related infringements based upon unions' effort to procure a card-check neutrality agreement through an aggressive e corporate campaign, including anti-Cintas and parody websites, social media initiatives, press releases, direct correspondence to customers and investors, and similar non-picketing persuader activities), aff'd, 355 Fed. Appx. 508 (2d Cir. 2009).

CONCLUSION

For the reasons discussed above and those presented in the amici briefs submitted by other labor organizations, the Board should adhere to the Eliason & Knuth and Brandon Regional Medical Center decisions.

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Respectfully submitted,

SPIVAK LIPTON LLP
1700 Broadway
New York, NY 10019
212-765-2100

BY: /s/ James M. Murphy
James M. Murphy
Lydia Sigelakis
Nicholas A. Johnson
*Attorneys for the District Council
of New York City & Vicinity
of the United Brotherhood of Carpenters
and Joiners of America*

jmurphy@spivaklipton.com
lsigelakis@spivaklipton.com
njohnson@spivaklipton.com