

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

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 150**

And

DONEGAL SERVICES, LLC.

And

ROSS BUILDERS, INC.

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

**MOTION OF THE ACTING GENERAL COUNSEL TO THE NATIONAL
LABOR RELATIONS BOARD TO WITHDRAW GENERAL COUNSEL'S
EXCEPTIONS AND
BRIEF IN SUPPORT THEREOF TO THE DECISION AND RECOMMENDED
ORDER OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.24 of the Board's Rules and Regulations, Counsel for the Acting General Counsel hereby submits this Motion and urges the Board to approve withdrawal of the Counsel for the General Counsel's Exceptions and Brief in Support Thereof to the Decision and Recommended Order to the Administrative Law Judge, as the Acting General Counsel has determined that further prosecution of certain legal theories in the Order Consolidating Cases, Consolidated Complaint undermines current Board law and is not in the public interest.

On September 18, 2018, Charging Party Donegal Services, LLC (Donegal) filed Cases 13-CP-227526 and 13-CC-227527, and on November 26, 2018, Donegal filed Case 13-CC-231597. On December 20, 2018, Charging Party Ross Builders, Inc. (Ross Builders) filed Case 13-CC-233109. On December 20, 2018, Region 13 of the National Labor Relations Board issued a consolidated complaint in this matter, which was amended on December 31, 2018. GC

1(g), 1(k). The consolidated complaint alleged that International Union of Operating Engineers, Local 150, AFL–CIO (Respondent) unlawfully engaged in recognitional picketing for more than 30 days without filing a petition for recognition with the Board in violation of Section 8(b)(7)(C) of the National Labor Relations Act (Act), and engaged in unlawful picketing of various secondary employers in violation of Section 8(b)(4)(i)(ii)(B) of the Act through the use of inflatable rats and large banners. GC 1(g)(VI–XIV); GC 1(k)(VII–IX).

A hearing took place on January 16–18, 22–24, and February 7–8, 2019 before Administrative Law Judge Kimberly Sorg–Graves after which she issued a decision and recommend order on December 13, 2019. In her decision, ALJ Sorg–Graves recommended dismissal of those portions of the Consolidated Complaint concerning the use of inflatable rats and banners without the presence of traditional picketing. See *International Union of Operating Engineers, Local 150 AFL–CIO (Donegal Services, LLC and Ross Builders, Inc.)*, JD–94–19 (Dec. 13, 2019).

On February 7, 2020, Counsel for then General Counsel Peter Robb filed exceptions to the ALJ’s dismissal of that portion of the Complaint concerning the inflatable rats and banners, urging the Board, inter alia, to overrule *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010), *Sheet Metal Workers Local 15 (Brandon Regional Medical Center (Brandon II))*, 356 NLRB 1290 (2011), and *Carpenters Southwest Regional Councils Locals 184 & 1498 (New Star)* 356 NLRB 613 (2011), reverse the ALJ, and find the Union’s use of inflatable rats violated Section 8(b)(4)(ii)(B). The case is currently pending before the Board.

Former General Counsel Robb’s term ended on January 20, 2021, and Acting General Counsel Peter Sung Ohr was designated by President Biden on January 25, 2021. Acting General Counsel Ohr disagrees with the recommendations set forth in Counsel for the former General

Counsel's brief to overturn Board law and find the Union's conduct violative of Section 8(b)(4). Indeed, the Union's conduct here is lawful under the Board's holdings in *Eliason* and *Brandon II* and the reasoning of every federal court to consider the issue. *See, e.g., Overstreet v. United Bhd. of Carpenters, Local Union No. 1506*, 409 F.3d 1199 (9th Cir. 2005) (affirming denial of Section 10(l) injunction as there was no likelihood of success on the merits of the allegation that union's use of banners violated Section 8(b)(4)); *Gold v. Mid-Atlantic Regional Council of Carpenters*, 407 F.Supp.2d 719 (D. Md. 2005) (denying Section 10(l) injunction; no reasonable cause to believe union's use of banner violated Section 8(b)(4)); *Benson v. United Bhd. of Carpenters, Locals 184 and 1498*, 337 F.Supp.2d 1275 (D. Utah 2004) (same; Section 10(l) injunction denied based on no reasonable cause); *Kohn v. Southwest Regional Council of Carpenters*, 289 F.Supp.2d 1155 (C.D. Cal. 2003) (same; Section 10(l) injunction denied based on no likelihood of success on the merits). Notably, the Board's decisions in *Eliason* and *Brandon II* governing inflatables, and the Board's historic inability to convince the federal courts that there is even a likelihood of success and/or reasonable cause to show that such union conduct violates Section 8(b)(4), prevented former General Counsel Robb from obtaining Section 10(l) relief after issuing complaint in two recent cases. *See Ohr v. IUOE Local 150*, -- F.Supp.3d --, 2020 WL 1639987 (N.D. Ill. 2020) (denial of Section 10(l) injunction of union's use of banners and inflatables); *King v. Constr. & Building Laborers' Local 79*, 393 F.Supp.3d 181 (E.D.N.Y. 2019) (same; digital banner and inflatables).

Acting General Counsel Ohr therefore moves the Board to Approve the Withdrawal of his Exceptions and Brief in Support, as it is inconsistent with Board law, Circuit Court enforcement thereof, and based on his decision to cease prosecution of those portions of the

Consolidated Complaint dealing with inflatable rats and banners that are not in combination with picketing as such pursuit is a waste of valuable Agency resources and not in the public interest.¹

DATED this 18th day of February, 2021.

Respectfully Submitted,

/s/ Kevin McCormick

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¹ The ALJ also ruled in the General Counsel's favor on the 8(b)(7)(C) allegations regarding Local 150's picketing of Charging Party Donegal. (Local 150's activity included patrolling with picket signs). She also ruled that the banner and rat displays in combination with its traditional picketing of Charging Party Donegal at Boughton Materials violated Section 8(b)(4)(i)(ii)(B). Similarly she found the banner, rat, and traditional picketing combination at Elmhurst Chicago Stone in Bolingbrook, Illinois, to be unlawful under Section 8(b)(4)(i)(ii)(B). The ALJ did not find violations at any of the other locations (Elmhurst Chicago Stone (Elmhurst, Illinois location) Ross Builders, Greenscape, Provençal, Overstreet Builders, Andy's Frozen Custard, Settler's Hill).

The Acting General Counsel does not challenge these findings by the ALJ.

Respondent Local 150 excepted to all of the violations found by ALJ Sorg-Graves.

CERTIFICATE OF SERVICE

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

The undersigned hereby certifies that true and correct copies of Motion of Acting General Counsel to the National Labor Relations Board to Withdraw the Exceptions and Brief in Support to the Decision and Recommended Order of the Administrative Law Judge have been e-filed with the Executive Secretary and served this 18th day of February, 2021, in the manner indicated, upon the following parties of record.

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