No. 99-922

In the Supreme Court of the United States

IRONWORKERS LOCAL 386, PETITIONER

v.

WARSHAWSKY & COMPANY
AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that, in the circumstances of this case, the union did not commit an unfair labor practice by handbilling neutral employees at a job site that they shared with employees of an employer with which the union had a primary dispute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-37) is reported at 182 F.3d 948. The decision and order of the National Labor Relations Board (Pet. App. 38-44) and the decision of the administrative law judge (Pet. App. 44-74) are reported at 325 N.L.R.B. 748.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1999. The petition for a writ of certiorari was filed on October 7, 1999, and placed on this Court's docket on December 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Warshawsky & Company sells automobile parts and accessories. Pet. App. 48. In 1997, respondent was building a warehouse and mail order facility in LaSalle, Illinois. Respondent's general contractor, G.A. Johnson & Son, Inc. (Johnson), hired a number of unionized subcontractors to work on the LaSalle project. *Id.* at 44 n.1, 48-49. Petitioner Ironworkers Local 386 (union) had no labor dispute with Johnson or any of the subcontractors. *Id.* at 49-50.

In March 1997, respondent hired Automotion, Inc., to install rack and conveyor systems at the LaSalle site. Pet. App. 50. Automotion began working at the site on March 12. On March 13, at approximately 6:40 a.m., various agents of petitioner stationed themselves in close proximity to the site's entrance along a roadway used primarily by individuals accessing the site. *Id.* at 50-51. As employees of Johnson and the subcontractors approached the site in their vehicles, petitioner's agents handed them a handbill which stated (in varying sizes of print):

> AUTOMOTION, INC. IS DESTROYING THE STANDARD OF WAGES FOR HARD-WORKING UNION MEMBERS
>
> AUTOMOTION, INC. PAYS SUBSTANDARD WAGES AND FRINGE BENEFITS
>
> IGNORING THE AREA STANDARDS THREATENS THE EFFORTS AND SACRIFICES OF ALL UNION MEMBERS
>
> * * * * *

> Iron Workers Local 386 is currently engaged in a labor dispute concerning the failure of Automotion, Inc. to pay the area standard wages and fringe benefits. We are appealing only to the general public. We are not seeking any person to cease work or to stop making deliveries.

Id. at 52-53. Petitioner's agents also spoke briefly with the employees to whom they gave handbills, but the content of those conversations is not known. *Id.* at 52. Petitioner's handbilling continued for about four hours and resulted in an unspecified number of employees of Johnson and the subcontractors refusing to enter the site or to perform services for their respective employers. Petitioner also handbilled and spoke with employees of Johnson and the subcontractors on the mornings of March 14, 17, 18, and 19, with the same result. *Id.* at 53. None of petitioner's handbilling activity occurred at times when Automotion's employees were actually present at the site. *Id.* at 51-52.

2. Acting on a charge filed by respondent, the General Counsel of the National Labor Relations Board (Board) issued a complaint, which alleged that petitioner had violated Section 8(b)(4)(i)(B) of the National Labor Relations Act (Act), 29 U.S.C. 158(b)(4)(i)(B), which, in pertinent part, makes it an unfair labor practice for a union "to induce or encourage any individual * * * to engage in a strike or a refusal * * * to perform any services * * * where * * * an object thereof is * * * forcing or requiring any person * * * to cease doing business with any other person." See Pet. App. 44. In particular, the General Counsel contended that petitioner's conduct "unlawfully induced and encouraged employees of Johnson and of its subcontractors to refuse * * * to perform services

for their own neutral employers * * * for the ultimate object of forcing and requiring [respondent] to cease doing business with Automotion." *Id.* at 53. The General Counsel, respondent, and petitioner agreed to waive a hearing and submitted the matter to an administrative law judge (ALJ) for decision on a stipulated record. *Id.* at 44.

The ALJ dismissed the complaint. Pet. App. 74. The ALJ explained that, in determining whether a union's area-standards handbill, "even when disseminated to members of a labor organization at a common situs," violates the Act, "analysis must proceed with care" because of the protections afforded such messages under the First Amendment. *Id.* at 63. Examining the stipulated record in light of that principle, the ALJ concluded that "a preponderance of the * * * evidence fails to establish that the failure of some of [the neutral] employees to report for work * * * had been other than a spontaneous reaction" to lawful area-standards handbilling activity by petitioner. *Id.* at 53-54.

A majority of the Board summarily affirmed the ALJ's dismissal of the complaint. Pet. App. 38-39. In a separate concurrence, Chairman Gould noted that this was "a close case," because "the facts arguably suggest that [petitioner] was indeed making an appeal, through a careful wink and a nod, for the employees to engage in a work stoppage." *Id.* at 40-41. He concluded, however, that "[t]he 'nod, wink, and a smile' theory cannot prevail" in this case, because "the handbill explicitly stated that [petitioner] was not seeking a work stoppage, and * * * the record fails to show what [petitioner's agents] said to the employees as they approached the job-site and received the handbills." *Id.* at 43.

3. Respondent filed a petition for review of the Board's dismissal order in the United States Court of

Appeals for the District of Columbia Circuit. In a divided decision, the court of appeals granted the petition. Pet. App. 2. The majority found "not all that clear" the basis for the ALJ's conclusion that, in cases such as this one, "analysis must proceed with care" in view of constitutional concerns. *Id.* at 7. Rather, the court concluded, "the First Amendment does not protect communications directed at—and only at—the neutral employees merely because the form of communications is handbilling and conversations." *Id.* at 8. The court had "no difficulty" in concluding that the Board's finding that petitioner's handbilling activity was lawful "lacks substantial evidence." *Id.* at 18. Instead, the court found that the evidence "'demand[s]' the inference that the union sought to induce the neutral employees to walk off the job site." *Id.* at 12.

In the court's view, "[t]he handbills themselves, the time, place, and manner of their distribution, the simultaneous conversations between the union agents and the neutral employees, and the subsequent response of those employees all combine to paint only one plausible picture." Pet. App. 12. The court found it significant that the statement that petitioner was not seeking to cause a work stoppage was "contained in only very small print at the bottom of the handbill." *Ibid.* The court further stated that "the main language of the handbill * * * clearly tells the recipients of the handbill that they should regard this matter as one in which they as union members have a stake." *Id.* at 13. The court also relied on the fact that the handbilling "took place on an access road to the construction site (the common situs) only at times when the employees of Johnson and its subcontractors—the neutral employees —were reporting for work and during which, as the union knew, Automotion was not working." *Id.* at 14.

Finally, although the court acknowledged that the content of the conversations between petitioner's agents and the recipients of the handbills was not known, the court reasoned that only statements inducing the employees to stop work were consistent with the circumstances. *Id.* at 16. The court concluded that, even though "it is possible to infer that the neutral employees 'spontaneously' walked off the job after receiving the handbills and talking with the union agents," that inference was not reasonable in this case. *Id.* at 18.

Judge Wald dissented. Pet. App. 19-37. She argued that, because of free-speech concerns, "the analysis of whether a union has violated Section 8(b)(4) as a result of communicating via handbills with members of other labor organizations must proceed with some care. In other words, one ought not too easily assume that a union has an illegal intent or motive when handbilling neutral employees." *Id.* at 27. The dissent rejected the majority's conclusion that "the evidence here, entirely circumstantial, is so overwhelming against the Union that it brooks of only one conclusion." *Id.* at 36. Rather, in the dissent's view, the stipulated record "did not sufficiently support (let alone compel) the conclusion that [petitioner] violated section 8(b)(4)." *Id.* at 29.

DISCUSSION

1. Under Section 8(b)(4)(i)(B) of the National Labor Relations Act (Act), 29 U.S.C. 158(b)(4)(i)(B), it is an unfair labor practice for a union to "induce or encourage" employees of a neutral employer to engage in a strike or to refuse to perform services with the object of forcing or requiring that employer to cease doing business with another employer. In this case, the

Board found, based on the stipulated record, that petitioner did not seek to induce a work stoppage by handbilling and speaking with the neutral employees, but the court of appeals rejected the Board's assessment of the record. Finding that the language of the handbill and the circumstances surrounding its distribution "all combine to paint only one plausible picture," the court inferred from the record that "the union sought to induce the neutral employees to walk off the job site." Pet. App. 12.

Although the court of appeals erred, this Court's review is not warranted. The court of appeals acknowledged that it was required to sustain the Board's finding if any reasonable factfinder could have made such a finding (Pet. App. 11-12), but the court nonetheless improperly substituted its own view of the record for the Board's reasonable view. As the dissent noted (*id.* at 31), the majority also improperly "dr[e]w every possible inference against the Union," even when the Board had reasonably drawn a contrary inference. Nonetheless, the court's conclusion that the union committed an unfair labor practice in the circumstances of this case is highly fact-bound and raises no issue of sufficient general importance to warrant further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951) (Supreme Court review of substantial-evidence questions is rarely warranted). For those reasons, the Board did not file a petition for a writ of certiorari in this case, although the Board would defend its decision and order if the Court granted the union's petition.

2. Petitioner, relying primarily on the dissenting opinion in the court of appeals, contends (Pet. 9-10) that "the Majority Decision's approach to this case dangerously encroaches upon the statutory and constitutional

protections accorded to handbills" in *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988). That contention, however, does not raise an issue that warrants this Court's review in this case.

In *DeBartolo*, the union had a dispute with a company that had been hired to build a department store in a shopping mall. The issue before the Court was whether, as the Board had held, the union "coerce[d]" the mall's neutral tenants, in violation of Section 8(b)(4)(ii)(B) of the Act, by distributing to the mall's customers a handbill that asked them not to shop at any of the stores in the mall. 485 U.S. at 570-573.[1] In order to "obviate[] deciding" the "serious questions of the validity of [Section] 8(b)(4) under the First Amendment" that otherwise would have been raised by the Board's holding, the Court construed Section 8(b)(4)(ii)'s prohibition against "threats, coercion, or restraints" as not "reach[ing] the handbills involved in [that] case." 485 U.S. at 575, 578. In doing so, the Court emphasized, among other things, that the handbills "urged potential customers of the mall to follow a wholly legal course of action, namely, not to patronize the retailers doing business in the mall." *Id.* at 575.

The majority of the court of appeals concluded that *DeBartolo* is "fundamentally different" from the instant case. Pet. App. 9. In *DeBartolo*, the majority noted, "the mall's potential customers were being urged 'to follow a wholly legal course of action.' * * * By

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[1] Section 8(b)(4)(ii)(B), in pertinent part, makes it an unfair labor practice for a union "to threaten, coerce, or restrain any person * * * where * * * an object thereof is * * * forcing or requiring any person * * * to cease doing business with any other person." 29 U.S.C. 158(b)(4)(ii)(B).

contrast, the conduct sought by a union that directly induces or encourages a secondary strike is itself unlawful under [Section] 8(b)(4)(i)." Pet. App. 9-10 (quoting *DeBartolo*, 485 U.S. at 575). Thus, "an appeal limited to employees of a neutral employer which reasonably could be found to be an inducement to engage in a secondary strike" is not protected by the First Amendment. *Id.* at 10.

Judge Wald in dissent did not disagree with that principle, which the Board also accepts. See Pet. App. 27 ("It is of course true that if the General Counsel had actually proven that a union induced and encouraged employees of a neutral employer to engage in a work stoppage * * * then that union could not complain that its First Amendment rights had been violated."); *Id.* at 55. Rather, the dissent took issue with the majority's conclusion that the record in this case compelled a finding that petitioner had engaged in inducement or encouragement prohibited by Section 8(b)(4). *Id.* at 29. As we explain above, the Board agrees with the dissent rather than the majority. The fact-bound disagreement between the majority and the dissent does not, however, warrant review.

Judge Wald and the majority also disagreed in another respect: Judge Wald believed that *DeBartolo* indicates that "the analysis of whether a union has violated section 8(b)(4) as a result of communicating via handbills with members of other labor organizations must proceed with some care" so as not to tread on the union's First Amendment rights. See Pet. App. 27. The majority, by contrast, believed that First Amendment considerations do not call for extra caution. See *id.* at 8. The Board agrees with the dissent rather than the majority on that point. See *id.* at 63. We believe, however, that the difference of opinion is of little

practical import in this case given the majority's finding that the only "plausible" view of the evidence is that petitioner violated the Act. *Id.* at 12.[2]

3. Petitioner further contends (Pet. 11-14) that, contrary to *DeBartolo*, the court of appeals adopted a rule that a union's handbilling activity is necessarily an unfair labor practice if it does not fall within the so-called "publicity proviso" to Section 8(b)(4). There is no merit to that contention.

The publicity proviso provides that Section 8(b)(4) "shall [not] be construed to prohibit" certain types of "publicity, other than picketing." 29 U.S.C. 158(b)(4) (second proviso).[3] See generally *DeBartolo*, 485 U.S. at

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[2] Petitioner mistakenly contends (Pet. 10) that the court of appeals held that a union violates Section 8(b)(4) any time that its handbilling activity results in a work stoppage. The court did not attach dispositive significance to the success of petitioner's handbilling effort. Rather, the fact that a work stoppage actually occurred was only one of numerous circumstances on which the court relied in finding that petitioner committed an unfair labor practice. See Pet. App. 12-18.

[3] The publicity proviso states:

> [F]or the purposes of this paragraph (4) only [*i.e.* Section 8(b)(4)], nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

29 U.S.C. 158(b)(4) (second proviso).

581-588. In this case, all three judges of the court of appeals, as well as the Board, agreed that petitioner's handbill did not fall within the terms of the publicity proviso. Pet. App. 13-14 & n.7; see also *id.* at 25 & n.3, 56-58.[4]

Contrary to petitioner's assertion, however, the court of appeals did not hold that this determination required the conclusion that petitioner's handbill was unlawful. Rather, the court concluded only that a handbill that falls outside the publicity proviso may be regarded as "evidence of inducement." Pet. App. 14. The court then went on to consider the text of the handbill, as well as the other record evidence, before it concluded that petitioner's handbilling activity constituted an unfair labor practice. *Id.* at 12-18. Although, as we explain above, the court's conclusion was erroneous, it did not rest on a rule that any handbilling that does not fall within the publicity proviso is per se unlawful. And the court's decision does not otherwise warrant this Court's review.

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[4] The court of appeals found that the proviso "cannot constitute a defense for the union in this case most obviously because there was a work stoppage." Pet. App. 14 n.7. It also noted that "[t]he ALJ thought that it did not apply also because the handbills did not advise the public that [respondent] was distributing Automotion's 'products' (or perhaps that [respondent] could not even be thought a 'distributor')." *Ibid.*

CONCLUSION

For the foregoing reasons, the Board has not filed a petition for a writ of certiorari in this case. If, however, the Court grants the union's petition, the Board will defend its decision and order.

Respectfully submitted.

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