

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: July 14, 2011

TO : Robert Chester, Regional Director
Region 6

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Bricklayers & Allied Craftworkers, Local 9
(Arch Masonry, Inc.) 560-2550
Case 6-CC-2052 560-2550-8396

The Region submitted this case for advice as to whether the Union violated Section 8(b)(4)(i)(B) by placing an inflatable rat near a common situs in connection with lawful area standards picketing. We conclude that the Union did not violate the Act here because the Union was involved in lawful primary activity at a common situs.

Bricklayers & Allied Craftworkers, Local 9 (the Union) has a primary labor dispute with Arch Masonry, Inc., a nonunion masonry contractor. In May 2011,¹ the Union began picketing at two jobsites where Arch Masonry is performing work - a retail outparcel strip adjacent to a Lowe's Store in McCandless, Pennsylvania and the former Fifth Avenue High School in Pittsburgh. The Union picket signs at each jobsite read: "WE WANT THE PUBLIC TO KNOW ARCH MASONRY UNDERMINES WAGES OF B.A.C. #9." Although a reserve gate was set up at the Lowe's jobsite, the Employer concedes that the reserve gate system has not been followed at the unfenced site. No reserve gate was ever established at the Fifth Avenue jobsite. The Region has determined that the Union has engaged in lawful areas standard picketing at each jobsite.

The Lowe's jobsite is located at the far side of the parking lot to the Lowe's store and fronts on the parking lot. For one day, on May 16, the Union erected an inflatable rat emblazoned with the words "This Rat's Not For You," in the corner of the store parking lot. The rat was visible from the customer entrances to the store and from the rest of the parking lot.

¹ All dates are in 2011 unless otherwise noted.

The Union also placed an inflatable rat at the Fifth Avenue jobsite, for two weeks starting on May 18. The former High School is completely under construction and is not open for business. The rat was emblazoned with the same words, and occasionally the picketers leaned a picket sign against it. The rat was situated on a public sidewalk, to the right of the only entrance to the jobsite, on a busy thoroughfare. The rat and the picket signs faced away from the jobsite and towards the public street. On May 25, employees of a union electrical subcontractor refused to cross the picket line at the Fifth Avenue site. At the subcontractor's request, the Union agreed to pull the picketers from the site for a single day, and on May 26 the electrical workers entered the site and completed their work.

The Board recently held in *Brandon Medical Center* that the stationary display of a large inflatable rat near the entrance to a secondary employer did not violate Section 8(b)(4)(ii)(B) because it was not tantamount to picketing and was not otherwise coercive.² The Board found that the display of the inflatable rat, like the bannering found lawful in *Eliason & Knuth*,³ "must be viewed as 'expressive activity' protected by the First Amendment."⁴ Although there was no Section 8(b)(4)(i)(B) allegation in *Brandon*, the Board stated in *dicta* that "signals" by union agents directed to third parties are not unlawful "unless the third party to whom the 'signal' is directed are employees of secondary employers, as opposed to the general public, and the signal is to cease work."⁵ The Board noted that the rat display in that case was not used as a "signal" to employees of Brandon or any other employer to cease work,

² *Sheet Metal Workers Local 15 (Brandon Medical Center)*, 356 NLRB No. 162 (May 26, 2011).

³ *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (Aug. 27, 1020) (holding that the display of a stationary banner on a public sidewalk or right-of-way did not violate Section 8(b)(4)(ii)(B)).

⁴ *Brandon Medical Center*, slip op. at 4.

⁵ *Id.*

but rather was directed to members of the public, including hospital visitors.⁶

In this case, the Region has determined that the Union's picketing met the *Moore Dry Dock*⁷ requirements for lawful primary picketing at a common situs where secondary employers and their employees are also present. Since the rat was displayed in connection with the lawful primary picketing, and no enforced reserved gate system was in effect, that display also was lawful even though employees of secondary employers necessarily viewed it. We further note that there is no independent evidence of the Union attempting to induce employees of secondary employers to cease doing work such as language on the rats or accompanying picket signs that suggested that such employees should cease performing work.

Accordingly, the Region should dismiss the instant charge, absent withdrawal.

B.J.K.

⁶ *Id.* See also *Carpenters Southwest Regional Council Locals 184 & 1498 (New Star)*, 356 NLRB No. 88 (Feb. 3, 2011) (peaceful bannering at construction sites not open to the public did not violate Section 8(b)(4)(i)(B) because it did not constitute signal picketing or otherwise seek to induce or encourage any employees to cease work). In that case, the Board held that a "broad ban on peaceful, expressive activity" was not mandated by Section 8(b)(4)(i)(B) and would create serious constitutional questions that should be avoided. *Id.*, slip op. at 6.

⁷ *Sailors' Union of the Pacific (Moore Dry Dock Company)*, 92 NLRB 547, 549 (1950).