

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 25

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL UNION NO. 150, A/W  
INTERNATIONAL UNION OF OPERATING  
ENGINEERS, AFL-CIO

And

Case 25-CC-230368

MAGLISH PLUMBING, HEATING & ELECTRIC,  
LLC.

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted,

*/s/ Tiffany J. Limbach*

---

Tiffany J. Limbach  
Counsel for the General Counsel  
National Labor Relations Board  
Region 25  
575 North Pennsylvania St., Room 238  
Indianapolis, IN 46204  
(317) 991-7960  
tiffany.limbach@nlrb.gov

## Table of Contents

<b>I. Introduction .....</b>	<b>4</b>
<b>II. Statement of Facts .....</b>	<b>5</b>
A. <i>International Union of Operating Engineers, Local 150</i> .....	5
B. <i>Maglish Plumbing, Heating and Electric</i> .....	5
C. <i>Davis &amp; Sons Excavation, LLC</i> .....	6
D. <i>October 3, 2018, Local 150 Picketing Davis &amp; Sons</i> .....	6
E. <i>Local 150 starts Picketing Maglish</i> .....	7
1) <i>October 4 – October 5, 2018, at the Maglish Shop</i> .....	7
2) <i>October 8 – October 18, 2018, at the Division Road Jobsite</i> .....	8
<b>III. Legal Analysis .....</b>	<b>9</b>
A. <i>Primary vs Secondary Labor Dispute</i> .....	9
B. <i>Section 8(b)(4)</i> .....	10
1) <i>Section 8(b)(4)(i)(B)</i> .....	11
2) <i>Section 8(b)(4)(ii)(B)</i> .....	12
C. <i>Picketing</i> .....	14
D. <i>Government has a Substantial Interest in Justifying Some Restraints on First Amendment Freedoms in the Sphere of Labor Relations and Commerce</i> .....	15
E. <i>The Board’s Decisions in Eliason &amp; Knuth and Brandon II</i> .....	17
1) <i>Carpenters Local 1506 (Eliason &amp; Knuth of Arizona), 355 NLRB 797 (2010)</i> .....	17
2) <i>Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II), 356 NLRB 1290 (2011)</i> .....	20
3) <i>The Board wrongly decided Eliason &amp; Knuth and Brandon II</i> .....	21
<b>IV. Legal Argument .....</b>	<b>22</b>
A. <i>Local 150 Does Not Have a Primary Labor Dispute with Maglish</i> .....	22
B. <i>Local 150’s Use of the Rat and Banners, Separately and Together, at the Maglish Shop and the Division Road Jobsite was Tantamount to Picketing and Violated Section 8(b)(4)(i) and (ii)(B)</i> .....	24
C. <i>Even if Local 150’s Conduct at the Maglish Shop and the Division Road Jobsite Did Not Constitute Picketing, the Conduct was Nevertheless Unlawfully Coercive and Violated Section 8(b)(4)(ii)(B)</i> .....	29
D. <i>Local 150’s Conduct is Not Protected by the First Amendment</i> .....	30
<b>V. Conclusion and Remedy.....</b>	<b>31</b>

## Table of Authorities

### Cases

<i>Brown &amp; Root USA, Inc.</i> , 319 NLRB 1009 (1995) .....	13, 28
<i>Carpenters Kentucky District Council (Wehr Constructors)</i> , 308 NLRB 1129 (1992) .....	19
<i>Carpenters Local 1506 (Eliason &amp; Knuth of Arizona, Inc.)</i> , 355 NLRB 797 (2010) .....	passim
<i>Edward J. DeBartolo Corp. v. Florida Gulf Coast Building &amp; Construction Trades Council (DeBartolo II)</i> , 485 U.S. 568 (1988) .....	passim
<i>Giboney v. Empire Storage &amp; Ice Co.</i> , 336 U.S. 490 (1949) .....	17
<i>International Brotherhood of Electrical Workers, Local 501 v. NLRB (Samuel Langer)</i> , 341 U.S. 694 (1951) .....	passim
<i>International Brotherhood of Electrical Workers, Local 6 (Intercontinental Hotels)</i> , 286 NLRB 680 (1987) .....	13, 28
<i>International Brotherhood of Electrical Workers, Local 98 (Telephone Man)</i> , 327 NLRB 593 (1999) .....	12, 26
<i>Iron Workers Pacific Northwest Council (Hoffman Construction)</i> , 292 NLRB 562 (1989) .....	18
<i>Laborers Eastern Regional Organizing Fund (Ranches at Mt. Sinai)</i> , 346 NLRB 1251 (2006) .....	11
<i>Laborers Local 389 (Calcon Construction Co.)</i> , 287 NLRB 570 (1987) .....	14
<i>Lawrence Typographical Union 570 (Kansas Color Press)</i> , 169 NLRB 279 (1968) .....	14, 18, 26
<i>Long-Shoremen v. Allied International, Inc.</i> , 456 U.S. 212 (1982) .....	17
<i>Lumber &amp; Sawmill Workers Local Union No. 2797 (Stoltze Land &amp; Lumber Co.)</i> , 156 NLRB 388 (1965) .....	14, 18, 25
<i>Metropolitan Regional Council, Carpenters (Society Hill Towers Owners' Assn.)</i> , 335 NLRB 814 (2001) .....	15, 19, 30
<i>Mine Workers District 29 v. NLRB</i> , 977 F.2d 1470 (D.C. Cir. 1992) .....	13, 28
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982) .....	17
<i>National Society of Professional Engineers v. United States</i> , 435 U.S. 679 (1978) .....	17
<i>National Woodwork Manufacturer's Association v. N.L.R.B.</i> , 386 U.S. 612 (1967) .....	10, 22, 25
<i>NLRB v. Denver Building and Construction Trades Council</i> , 341 U.S. 675 (1951) .....	passim
<i>NLRB v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Maching, and General Pipefitters of New York and Vicinity, Local Union No. 638</i> , 429 U.S. 507 (1977) .....	10, 22

<i>NLRB v. Fruit Packers (Tree Fruits)</i> , 377 U.S. 58 (1964) .....	13
<i>NLRB v. Operating Engineers Local 825 (Burns &amp; Roe, Inc.)</i> , 400 U.S. 297 (1971).....	10
<i>NLRB v. Retail Clerks Local 1001 (Safeco Title Ins. Co.)</i> , 447 U.S. 607 (1980).....	passim
<i>NLRB v. Retail Store Employees</i> , 447 U.S. 607 (1980) .....	17
<i>NLRB v. Teamsters Local 182 (Woodward Motors)</i> , 314 F.2d 53 (2d Cir. 1963).....	14
<i>NLRB v. United Furniture Workers</i> , 337 F.2d 936 (2d Cir. 1964).....	19
<i>Ohralik v. Ohio State Bar Association</i> , 436 U.S. 447, 456 (1978).....	31
<i>Painters District Council 9 (We're Associates, Inc.)</i> , 329 NLRB 140 (1999) .....	14
<i>Service Employees Local 399 (William J. Burns Agency)</i> , 136 NLRB 431 (1962).....	15, 30
<i>Service Employees Local 525 (General Maintenance Co.)</i> , 329 NLRB 638 (1999) .....	11, 15, 26, 30
<i>Service Employees Union, Local 87 (Trinity Maintenance)</i> , 312 NLRB 715 (1993) .....	14, 15, 19, 26
<i>Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)</i> , 356 NLRB 1290 (2011) .....	passim
<i>Sheet Metal Workers Local 19 (Delcard Associates)</i> , 316 NLRB 426 (1995).....	12, 25, 26
<i>Sheet Metal Workers Local 48 v. Hardy Corp.</i> , 332 F.2d 682 (5th Cir. (1964).....	19
<i>United Brotherhood of Carpenters and Joiners of America v. Sperry</i> , 170 F.2d 863 (10th Cir. 1948) .....	16, 31
<i>United Mine Workers of America (New Beckley Mining)</i> , 304 NLRB 71 (1991).....	14
<i>United Mine Workers of America, District 2 (Jeddo Coal Co.)</i> , 334 NLRB 677 (2001) .....	14, 18, 19, 26
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968).....	17
<i>Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council</i> , 425 U.S. 748 (1976).....	15, 16, 20, 31
<i>Warshawsky &amp; Co. v. NLRB</i> , 182 F.3d 948 (D.C. Cir. 1999) .....	12
<b>Statutes</b>	
29 U.S.C. § 158(b)(4)(i) & (ii)(B) .....	11
<b>Other Authorities</b>	
H.R.Rep. No. 510, 80th Cong., 1st Sess. 43 .....	10

## **I. Introduction**

The Complaint alleges that International Union of Operating Engineers, Local Union No. 150 (“Local 150” or “Respondent”) violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (“Act”) when it displayed a large inflatable rat, a large stationary banner, and a sign targeting Maglish Plumbing, Heating & Electric (“Maglish” or “Charging Party”) near the Maglish place of business in Portage, Indiana (“Maglish Shop”) on October 4 and 5, 2018 and in front of the construction jobsite of Maglish owner Gary Carroll’s personal home in Valparaiso, Indiana (“Division Road Jobsite”) every day from October 8 – 18, 2018. Local 150 undertook this activity with the objects of inducing or encouraging a neutral employer’s employees to cease work and threatening, coercing, or restraining a neutral employer to cease doing business with others in commerce.

The record evidence will show that Local 150 does not have a primary labor dispute with Maglish; yet, at both the Maglish Shop and the Division Road Jobsite, Local 150 erected a scary and imposing inflatable rat, posted a sign on the rat declaring, “Gary the Lying Rat,” and displayed a large conspicuous banner identifying Maglish as “harboring rat contractors.” Local 150’s posting of the inflatable rat, separately and together with its posting of the stationary banner and sign, are tantamount to unlawful secondary picketing. By its actions near the Maglish Shop on October 4 and 5, 2018, Respondent unlawfully induced employees of neutral Maglish to cease work in violation of Section 8(b)(4)(i)(B) and unlawfully threatened and coerced neutral employer Maglish to cease doing business with Davis & Sons Excavation, LLC (“Davis & Sons”) in violation of Section 8(b)(4)(ii)(B) of the Act. Likewise, by its actions at the Division Road Jobsite daily from October 8 – 18, 2018, Respondent unlawfully induced employees of neutral Maglish and other neutral employers on the premises to cease work in violation of

Section 8(b)(4)(i)(B) and unlawfully threatened and coerced neutral employer Maglish to cease doing business with Davis & Sons Excavation, LLC (“Davis & Sons”) in violation of Section 8(b)(4)(ii)(B) of the Act. Even if this conduct is not found to be tantamount to picketing, by placing the inflatable rat, banner, and sign at both locations, Local 150’s conduct constituted unlawfully coercive non-picketing conduct in violation of Section 8(b)(4)(ii)(B) of the Act. The record shows that under current law, the totality of Local 150’s confrontational and disruptive activity crossed the line from legitimate communication to unlawful coercion.

## **II. Statement of Facts**

### *A. International Union of Operating Engineers, Local 150*

Local 150 is a labor organization, within the meaning of of Section 2(5) of the Act, and it represents members who perform excavation work within a certain territorial jurisdiction, which includes areas in northern Indiana. (Tr. 14, GC Ex. 1(f))

### *B. Maglish Plumbing, Heating and Electric*

Maglish is a mechanical contractor providing plumbing, heating, and electric services to residential and commercial customers. (Tr. 8, 18, GC Ex. 1(f)) Its principal and only place of business is located in Portage, Indiana, and Gary Carroll is an owner of the company. (Tr. 8, 18, GC Ex. 1(f)) Maglish has never been a party to a collective bargaining agreement or contract with Local 150 or any other union and has never even discussed its employees or their terms and conditions of employment with Local 150. (Tr. 32-33) Furthermore, Local 150 has never represented Maglish employees for purposes of collective bargaining and has never attempted to organize Maglish employees. (Tr. 32)

Gary Carroll also serves as the general contractor for the construction of his own personal residence located at 194 West Division Road in Valparaiso, Indiana. (Tr. 8-9, 18).

Division Road is fairly busy county road. (Tr. 27) As general contractor, Carroll gets estimates from contractors, hires contractors, and schedules the work necessary to build the home. (Tr. 18-19) Construction began on August 17, 2018, and at the time of the hearing, construction at the Division Road Jobsite was not yet complete. (Tr. 19, 35)

*C. Davis & Sons Excavation, LLC*

Davis & Sons is an excavation company operating within Local 150's territorial jurisdiction. (Tr. 14) Local 150 members perform the same kind of work that Davis & Sons performs, and Local 150 has an ongoing primary labor dispute with Davis & Sons. (Tr. 14, GC Ex. 1(f))

Davis & Sons performed some work at the Division Road Jobsite. (Tr. 14, 19) Davis & Sons dug the foundation to begin construction on the home on August 17, 2018 and delivered sand to the jobsite on October 3, 2018. (Tr. 19-20, 22, 35) It is likely that Davis & Sons did not perform any work at the Division Road Jobsite after they delivered the sand on October 3, 2018, and it is certain that Davis & Sons did not perform any work after October 12, 2018, when they removed a bulldozer it had parked at the Division Road Jobsite. (Tr. 19-20, 33).

*D. October 3, 2018, Local 150 Picketing Davis & Sons*

On October 3, 2018, Carroll was on site at the Division Road Jobsite on October 3, 2018. (Tr. 34) Some Maglish employees were performing underground work on the house, and Davis & Sons was delivering sand to the Division Road Jobsite that day. (Tr. 19-20, 22, 33-35). Local 150 agents followed Davis & Sons to the Division Road Jobsite to picket Davis & Sons. (Tr. 20) The agents pulled up in front of the home, parked their cars partially off the road and partially on the road, and got out of their vehicles. (Tr. 20-21, 37) They held signs stating, "Local 150 on Strike," "Davis & Sons," and "Unfair Labor Practice." (Tr. 22)

The first agent who arrived at the Division Road Jobsite was Jake Wetzel, and a second Local 150 agent arrived later. (Tr. 20, 22) When Local 150 first arrived, Carroll approached Wetzel and told him to “get the F--- off his property.” (Tr. 21) When the second agent arrived a bit later, he confronted Carroll without provocation and said, “[You] don’t seem so tough now, big boy,” “How would you like a nice rat in front of your shop?” (Tr. 22)

Carroll genuinely believed that Local 150 was illegally trespassing on his property and interfering with traffic, so he asked an employee to call the police. (Tr. 35-37, 40) A police officer came to the Division Road jobsite, Carroll explained his grievance to the officer, who did not require Local 150 to leave, and Local 150 continued picketing Davis & Sons without further incident on October 3, 2018.<sup>1</sup> (Tr. 37)

#### *E. Local 150 starts Picketing Maglish*

##### 1) October 4 – October 5, 2018, at the Maglish Shop

The next day on October 4, 2018, Local 150 inflated a giant, menacing rat near the Maglish Shop with a large stationary banner announcing, “SHAME ON MAGLISH FOR HARBORING RAT CONTRACTORS.” (Tr. 9-10, 14-15, 23-24, Jt. Ex. 1, GC Ex. 1(f)) Carroll saw the rat and the banners around 7:30 am while driving to work on October 4, 2018. (Tr. 23). Later that day, Local 150 agents placed a sign on the rat, which stated, “Gary the Lying Rat.” (Tr. 9-10, 14-15, Jt. Exs. 2, 3, GC Ex. 1(f)) The next morning when Carroll drove to work around 7:30 am, he saw the immense rat again, now wearing the sign saying, “Gary the Lying Rat,” and

---

<sup>1</sup> On December 7, 2018, Local 150 filed an unfair labor practice charge alleging that by calling the police on October 3, 2018, Maglish interfered with the union’s lawful picketing of Davis & Sons, and the Region found merit to the charge and the parties agreed to a settlement resolving the matter. (GC Ex. 1(f)) It should be noted though that Local 150 filed the unfair labor practice charge complaining that Carroll called the police only after Maglish filed the charge in the present case on November 2, 2018. (GC Ex. 1(a))

the banner announcing, “SHAME ON MAGLISH FOR HARBORING RAT CONTRACTORS.”  
(Tr. 25-26, Jt. Exs. 2, 3, GC Ex. 1(f))

On October 4<sup>th</sup> and 5<sup>th</sup> the rat, sign, and banner were placed at the corner of Old Porter Road and Route 20, about 500 feet from the Maglish Shop, which is located on Old Porter Road. (Tr. 23, 26) Route 20 in particular is heavily trafficked. (Tr. 28) The rat towered approximately 12 feet tall and 4 feet wide at the base. (Tr. 9-10, 14-15, 23, 28) It was brown with its claws outstretched in the air and sharp teeth. (Tr. 23-24, Jt. Exs. 1, 2, 3) It was designed to look scary. (Tr. 24) The “Gary the Lying Rat” sign was attached to the rat’s chest and measured approximately 24 inches tall by 16 inches wide. (Tr. 9-10, 26, Jt. Exs. 2, 3) The banner was also quite large, measuring approximately 3 feet tall and 8 feet long. (Tr. 9-10, 15, 24, Jt. Exs. 1, 2, 3) It was white with black lettering and staked into the ground right in front of the giant rat. (Tr. 24, Jt. Exs. 1, 2, 3) Three vehicles were parked in the grassy area near the rat and banner. (Tr. 24, 26, Jt. Ex. 1)

2) October 8 – October 18, 2018, at the Division Road Jobsite

Early in the morning of Monday, October 8, 2018, a neighbor to the personal residence Carroll was building on Division Road called Carroll and said, “We’ve got a rat problem.” (Tr. 28) Beginning on October 8, 2018, and continuing every day until October 18, 2018, Local 150 inflated the same giant rat with its “Gary the Lying Rat” sign attached and posted the same “SHAME ON MAGLISH FOR HARBORING RAT CONTRACTORS” banner at the Division Road Jobsite. (Tr. 10-11, 15, 28-30, Jt. Ex. 4, GC Ex. 1(f)) The rat and banner were placed in front of the house, just east of the driveway and approximately 5 feet from Division Road. (Tr. 28). Division Road is a county road with fairly heavy traffic. (Tr. 27)

The rat, sign, and banner were placed in the same location at the Division Road Jobsite every day from October 8 through October 18, 2018, and they appeared to be the same as those displayed near the Maglish Shop on October 4 and 5, 2018. (Tr. 30-31) The rat stood approximately 12 feet tall and 4 feet wide at the base, bared its sharp teeth, and raised its sharp claws on its outstretched arms. (Tr. 10, 15, 28, Jt. Ex. 4). Attached to the rat's chest was a white sign that measured approximately 24 inches tall by 16 inches wide and stated in black lettering, "Gary the Lying Rat." (Tr. 10, 15, 29, Jt. Ex. 4) The oversized banner stood approximately 3 feet tall by 8 feet wide and was staked to the ground next to the rat. (Tr. 10, 15, 29, Jt. Ex. 4) The banner had a white background with black lettering announcing "SHAME ON MAGLISH FOR HARBORING RAT CONTRACTORS." (Tr. 10-11, 15, 28-29, Jt. Ex. 4) Between October 8 and 18, 2018, Carroll visited the Division Road Jobsite about every other day, as the project was in the construction phase. (Tr. 30, 34) He saw the same rat, sign, and banner displayed in about the same location each day he visited the Division Road Jobsite during that time. (Tr. 30, 31) Carroll also saw vehicles parked near the rat and banner each day he visited the Division Road Jobsite between October 8 and 18, 2018. (Tr. 29-30, 31)

### **III. Legal Analysis**

#### *A. Primary vs Secondary Labor Dispute*

In *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 687 (1951), the Supreme Court discussed the difference between "primary" and "secondary" disputes, and noted the legislative history, "'Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B. Similarly it would not be lawful for a union to boycott employer A because

employer A uses or otherwise deals in the goods of, or does business with employer B.”  
(quoting H.R.Rep. No. 510, 80th Cong., 1st Sess. 43).

Later acknowledging the difficulty in determining whether a primary labor dispute exists, the Supreme Court declared that “the touchstone” of the analysis is whether the union’s conduct is intended to benefit the targeted employer’s employees or whether the conduct is intended to “satisfy the union’s objectives elsewhere.” *National Woodwork Manufacturer’s Association v. N.L.R.B.*, 386 U.S. 612, 644-645 (1967). The Supreme Court subsequently reaffirmed the standard set forth in *National Woodwork*, stating, “The issue is whether ‘an object’ of the inducement and the coercion was to cause the cease-doing-business consequences prohibited by s 8(b)(4), *the resolution of which* in turn depends on whether the product boycott was ‘addressed to the labor relations of [the employer] . . . vis-à-vis his own employees,’ or whether the union’s conduct was ‘tactically calculated to satisfy (its) objectives elsewhere.’” *NLRB v. Enterprise Ass’n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Maching, and General Pipefitters of New York and Vicinity, Local Union No. 638*, 429 U.S. 507, 528 (1977) (internal citations omitted) (emphasis added).

#### *B. Section 8(b)(4)*

Concern over unions pressuring neutral, secondary employers prompted the enactment of 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*, *supra* at 692 (1951) (“the Act prohibits labor organizations from picketing when “an objective” of the picketing is to enmesh so-called neutral employers in controversies not

their own”). As such, Section 8(b)(4)(i) and (ii)(B) of the Act makes it an unfair labor practice for a labor organization or its agents: (i) to induce or encourage employees to withhold their services from their employer or (ii) to threaten, coerce, or restrain any person engaged in commerce, where an object of the conduct is to force or require any person to cease doing business with any other person. 29 U.S.C. § 158(b)(4)(i) & (ii)(B); *see e.g., 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)) (“where . . . an object thereof is . . . forcing or requiring [a person] to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person . . . .”) (internal citations omitted).

1) Section 8(b)(4)(i)(B)

The National Labor Relations Board (“Board” or “NLRB”) has found a wide array of conduct aimed at employees of neutral employers to constitute unlawful inducement or encouragement to cease work in violation of Section 8(b)(4)(i)(B). While traditional picketing at the premises of a neutral employer has long been held to violate Section 8(b)(4)(i)(B). *Laborers Eastern Regional Organizing Fund (Ranches at Mt. Sinai)*, 346 NLRB 1251, 1253 (2006) (patrolling and picketing at construction site when only neutrals’ employees would be present establishes unlawful inducement and encouragement); *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB 638, 638-39 & n.10 (1999) (picketing at neutral employers’ premises has the “foreseeable consequence” of unlawfully inducing or encouraging neutrals’ employees to withhold their labor), *enfd.*, 52 Fed. App’x 357 (9th Cir. 2002); *International Brotherhood of Electrical Workers, Local 501 v. NLRB (Samuel Langer)*, 341 U.S. 694, 699-704 (1951) (peaceful picketing at construction site where neutral was present was unlawful inducement or encouragement to neutral’s employees to withhold their labor).

The Board and courts have also held that union activity at a neutral's premises that falls short of traditional picketing may still send a "signal" to a neutral's employees that they should withhold their services. For example, in *International Brotherhood of Electrical Workers, Local 98 (Telephone Man)*, a union agent stationed himself at the neutral gate of a construction site with a sign hanging around his neck that read "observer" but when "conveniently flipped over" revealed language indicating that the primary employer did not pay appropriate wages. 327 NLRB 593, 593 (1999). The Board concluded the agent was not a benign observer but instead was engaged in unlawful signal picketing. *Id.* Likewise, in *Sheet Metal Workers Local 19 (Delcard Associates)*, the Board affirmed the ALJ's conclusion that a union engaged in unlawful signal picketing by posting an agent in a rat costume near a neutral gate. 316 NLRB 426, 437-438 (1995) *affirmed in relevant part*, 154 F.3d 137, 139, n.3 (3d Cir. 1998). By using a rat costume, the union "intentionally sought to create the impression that this was an unfair job," and thereby unlawfully induced and encouraged neutral employees to cease work. *Id.*, *see also* *Warsawsky & Co. v. NLRB*, 182 F.3d 948, 953-54 (D.C. Cir. 1999) (handbilling decrying primary employer's substandard wages and benefits, that took place on access road to construction site at times when only neutral employees would be present, constituted unlawful inducement and encouragement), certiorari denied, 529 U.S. 1003 (2000).

## 2) Section 8(b)(4)(ii)(B)

In determining what constitutes unlawful threats, coercion, or restraint under Section 8(b)(4)(ii)(B), the Supreme Court has determined specifically that handbilling at a neutral employer's business is lawful; however, picketing urging a boycott of the neutral employer is

coercive and therefore unlawful.<sup>2</sup> *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council (DeBartolo II)*, 485 U.S. 568, 579-80 (1988) (citing *Safeco Title Ins. Co.*, *supra* at 607). The Court distinguished handbilling from picketing because, “[P]icketing 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). In contrast, handbilling relies solely on the persuasive force of the ideas expressed within the handbill, rather than the confrontational element inherent in picketing. *Id.*

Furthermore, to find a violation of Section 8(b)(4)(ii)(B), it is not necessary to find that the only object of a union’s conduct was unlawful, “[A]s long as at least one object of picketing is shown by the weight of credible evidence to be unlawful.” *Brown & Root USA, Inc.*, 319 NLRB 1009, 1109 (1995); *see also Denver Building Trades and Construction Council*, *supra* at 689 (“it is not necessary to find that the sole object of the strike was that of forcing the contractor to terminate the subcontractor's contract”); *Mine Workers District 29 v. NLRB*, 977 F.2d 1470, 1471 (D.C. Cir. 1992) (“one object of the picketing, even if not the sole object, was to induce the [neutral business] to cease doing business with the [primary employer's] employees”); and *International Brotherhood of Electrical Workers, Local 6 (Intercontinental Hotels)*, 286 NLRB 680, 685 (1987) (“if one of the objects of the picketing was unlawful, it is immaterial that [the union] had a legitimate interest in protesting” other matters).

---

<sup>2</sup> The Court has held though 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).

### C. Picketing

The Board and courts have historically defined picketing in a very broad and flexible manner. *See e.g., United Mine Workers of America, District 2 (Jeddo Coal Co.)*, 334 NLRB 677 (2001); *Service Employees Union, 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); *Lumber & Sawmill Workers Local Union No. 2797 (Stoltze Land & Lumber Co.)*, 156 NLRB 388, 394 (1965).<sup>3</sup> Reflecting the historically broad definition of picketing, the Board and courts have found a variety of conduct to be picketing or tantamount to picketing, including: planting signs in a snowbank and watching the signs from a parked car, *NLRB v. Teamsters Local 182 (Woodward Motors)*, 314 F.2d 53 (2d Cir. 1963), *enf'g.*, 135 NLRB 851 (1962); posting stationary agents with signs near an employer's entrance, *Jeddo Coal Co.*, *supra* at 686; groups of men gathering around a sign, *Painters District Council 9 (We're Associates, Inc.)*, 329 NLRB 140, 142 (1999); union agents standing near a stationary sign or sitting in parked van with sign on outside of van, *Laborers Local 389 (Calcon Construction Co.)*, 287 NLRB 570, 573 (1987); disorderly conduct in front of a neutral's business, including attaching a banner to the neutral's building, *Trinity Maintenance*, *supra* at 746; and the massed gathering of strikers and community members without picket signs or placards in a neutral hotel's parking lot where strikebreakers were staying, *United Mine Workers of America (New Beckley Mining)*, 304 NLRB 71, 72 (1991), *enfd.*, 977 F.2d 1470 (D.C. Cir. 1992). Patrolling and carrying picket signs, while certainly factors to consider in determining whether a union's conduct constitutes picketing, have never been prerequisites to establish picketing activity. *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797,

---

<sup>3</sup> *c.f. Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010); *Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)*, 356 NLRB 1290 (2011).

814-15 (2010) (Members Schaumber and Hayes, dissenting) (citing, *inter alia*, *Trinity Maintenance*, *supra* at 743, 746).

Furthermore, the Board has found other non-picketing conduct to be coercive and thus unlawful within the meaning of Section 8(b)(4)(ii)(B), including: broadcasting a message at extremely high volume through loudspeakers facing a neutral condominium building, *Metropolitan Regional Council, Carpenters (Society Hill Towers Owners' Assn.)*, 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.)*, *supra* at 664-65, 680; and twenty to seventy 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) (union's conduct "overstepped the bounds of propriety and went beyond persuasion so that it became coercive to a very substantial degree").<sup>4</sup>

*D. Government has a Substantial Interest in Justifying Some Restraints on First Amendment Freedoms in the Sphere of Labor Relations and Commerce*

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 that the First Amendment does not otherwise protect prohibited secondary conduct. *Samuel Langer*, *supra* at 705 (secondary picketing, as well as phone call emphasizing the purpose of the picketing, not protected by the First Amendment); *see also Safeco Title Ins. Co.*, *supra* at 616 ("[a]s applied to picketing that predictably encourages consumers to boycott a

---

<sup>4</sup> Two members of the Board majority in *William J. Burns Agency* would have labeled the union's conduct "picketing."

secondary business, § 8(b)(4)(ii)(B) imposes no impermissible restrictions upon constitutionally protected speech”). Previously, the Tenth Circuit likewise observed that, “[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). In *Sperry*, the court found that the union’s conduct, including promulgating a “blacklist,” placing a neutral employer on the blacklist, and picketing the neutral employer, was unprotected by the First Amendment. *Id.* As such, there is no constitutional barrier to prohibitions on such secondary boycotts and picketing.

In a similar vein, commercial speech is entitled to less constitutional protection, especially where it does not implicate the public interest. *Virginia Citizens Consumer Council*, *supra* at 762-64. In *DeBartolo II*, the Supreme Court declined to read Section 8(b)(4)(ii)(B) as prohibiting a union’s handbilling, which expressed the advantages of unionization to the public. *supra* at 575-576. The Court also applied the canon of constitutional avoidance, as 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. Though, the Court declined to analyze the parameters of commercial speech, it acknowledged that if a union *did* engage in commercial speech, that speech would be entitled to lesser constitutional protection. *Id.*

Nevertheless, the Supreme Court has recognized, “the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association.” See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912

(1982) (citing *United States v. O'Brien*, 391 U.S. 367 (1968); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); and *NLRB v. Retail Store Employees*, 447 U.S. 607 (1980)). For example, business' rights to associate with other entities in order to suppress competition and engage in unfair trade practices may be restricted, just as unions' rights to engage in secondary boycotts and picketing are limited. *Id.* (citing *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *NLRB v. Retail Store Employees*, *supra*, at 617-618 (Blackmun J., concurring in part); *Long-Shoremen v. Allied International, Inc.*, 456 U.S. 212, 222-223, and n. 20 (1982); *see also Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)*, 356 NLRB 1290. 1296 (2011) (Member Hayes dissenting).

*E. The Board's Decisions in Eliason & Knuth and Brandon II*

In defense of its conduct in the present case, Local 150 will undoubtedly rely on *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010), and *Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)*, 356 NLRB 1290 (2011). In those decisions, the Board narrowed its definition of picketing, and thereby the scope of unlawful activity prohibited by Section 8(b)(4). The Board determined that certain union conduct, which would likely have been considered picketing under the previous broad standard, was lawful non-picketing secondary activity under the Act.

1) *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010)

In *Eliason & Knuth*, *supra*, the Board majority concluded that a union's posting of agents holding large, stationary banners proclaiming, "labor dispute" and "shame on [the secondary employer]" in front of neutral businesses did not violate Section 8(b)(4)(ii)(B), and in particular, the Board majority stated its view that stationary bannering is not tantamount to picketing. Thus, for the first time, the Board held that the "carrying of picket signs and persistent

patrolling” were necessary predicates to establish picketing. *Eliason & Knuth*, supra at 802. In so doing, the majority specifically acknowledged the Board’s own prior decisions defining picketing in much broader terms. *Id.* at 803-804 (citing, e.g., *Stoltze Land & Lumber Co.*, supra at 394 (posting union agents to confront customers and employees near employer’s entrance is picketing); *see also Kansas Color Press*, supra at 283 (strikers, who sat in their cars at entrance to employer’s premises and confronted members of the public arriving at premises, were engaged in picketing); *Iron Workers Pacific Northwest Council (Hoffman Construction)*, 292 NLRB 562 fn. 2 (1989), *enfd.*, 913 F.2d 1470 (9th Cir. 1990) (groups of union agents gathered around a sign constitutes picketing); *Jeddo Coal*, supra at 686 (union agents standing with picket signs without patrolling, constitutes picketing).

The Board majority ostensibly reconciled that broader precedent by noting that in many of those cases, the display of stationary signs was preceded by union agents’ ambulatory picketing, during which they often used traditional picket signs. *Eliason & Knuth*, supra at 804. The majority also noted that many of those cases pre-dated the Supreme Court’s decision in *DeBartolo II*, and a definition of picketing that relied solely on the posting of a union agent near the entrance to an employer’s place of business was incompatible with *DeBartolo II*’s holding that handbilling near an entrance was lawful. *Id.* at 803.

In addition to concluding that the bannerling was not equivalent to picketing, the *Eliason* Board determined that the bannerling was not otherwise coercive within the meaning of Section 8(b)(4)(ii)(B) and declined to find the bannerling unlawful in order to sidestep a potential constitutional question. *Id.* at 805-806. The Board majority determined the union’s bannerling was not coercive because it did not block ingress or egress to the neutral businesses or otherwise disrupt the neutral businesses’ operations. *Id.* (citing *Society Hill Towers Owners’ Assn.*, supra at

820-823). Applying the doctrine of constitutional avoidance, the Board concluded that finding the bannering unlawful would raise serious First Amendment issues and so declined to read Section 8(b)(4)(ii)(B) as forbidding the banner displays. *Id.* at 807-811.

In contrast, dissenting Board Members Schaumber and Hayes would have found the bannering to be unlawful secondary picketing. *Id.* at 811-821. They argued that Section 8(b)(4)(ii)(B) was meant to broadly shield innocent neutral employers from “nonjudicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing, or other economic retaliation or pressure in the background of a labor dispute.” *Id.* at 813 (emphasis removed, internal quotation marks omitted) (quoting *Sheet Metal Workers Local 48 v. Hardy Corp.*, 332 F.2d 682, 686 (5th Cir. (1964)); citing *Carpenters Kentucky District Council (Wehr Constructors)*, 308 NLRB 1129, 1130 fn. 2 (1992)).

The dissent pointed to the extensive body of law in which the Board and courts have defined labor picketing flexibly and broadly and argued that bannering was the “confrontational equivalent of picketing” that sought to induce the public to react with “emotions” and “fear of retaliation” rather than by appealing to the public’s reason. *Id.* at 814-815 (citing *NLRB v. United Furniture Workers*, 337 F.2d 936, 940 (2d Cir. 1964)). Furthermore, the dissent observed the sheer size of the banners obviated the need for traditional patrolling because it created a physical, or at least a “symbolic[ally] confrontational” barrier to those seeking access to the neutral’s premises. *Id.* Disagreeing with the majority’s contention that an expanded definition of picketing was inconsistent with the Supreme Court’s decision in *DeBartolo II*, the dissent noted that the Board had long adhered to an expanded definition of picketing, even in the wake of *DeBartolo II*. *Id.* at 817-18 and fn. 30 (citing *Trinity Maintenance*, 312 NLRB 715, 743 (1993); *Jeddo Coal Co.*, *supra* at 686). The dissent argued that *DeBartolo*’s holding was limited to finding that

*handbilling* at a neutral employer's facility was lawful, inasmuch as the success of handbilling turns solely on persuasion through ideas. *Id.* at 817-818. Because a banner, by contrast, contains much less speech than a handbill, and mimics the confrontational aspects of a picket line, its success depends on intimidation, rather than mere persuasion. *Id.*

Finally, the dissenters disagreed with the majority's application of the doctrine of constitutional avoidance. They explained 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. *Id.* at 820 (citing *Safeco Title Ins. Co.*, *supra* at 616). The dissent noted that even if secondary bannering were entitled to some First Amendment protection, the government has a substantial interest in regulating labor relations, which justifies some restrictions on free speech. *Id.* 820-21 (citing *Virginia Citizens Consumer Council*, *supra* at 763 fn. 17). In this regard the dissent asserted that the First Amendment concerns are not as strongly implicated because, in contrast to handbilling, the conduct element of secondary bannering predominates over the speech element. *Id.* at 821.

2) *Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)*, 356 NLRB 1290 (2011)

In 2011, the Board extended its holding in *Eliason & Knuth* to find a union's use of a large, inflatable rat was neither picketing nor otherwise coercive. *Brandon II*, *supra* at 1292. In *Brandon II*,<sup>5</sup> the union set up a large, inflatable rat on a truck approximately 100 feet from the neutral hospital's front door, and the same three-member *Eliason & Knuth* Board majority held

---

<sup>5</sup> In the original Board decision in that case, the Board concluded that the union violated Section 8(b)(4)(ii)(B) by staging a "mock funeral" on public property in front of a hospital, including patrolling while carrying a fake casket and accompanied by a union member dressed as the Grim Reaper. *Sheet Metal Workers Local 15 (Brandon Regional Medical Center) (Brandon I)*, 346 NLRB 199 (2000), *enf. den.*, 491 F.3d 429 (D.C. Cir. 2007). However, because the Board determined that finding the rat to be unlawful would simply be a cumulative violation with the mock funeral, it declined to pass on the lawfulness of the rat at that time. *Id.*, at 200, fn. 3. The Board's *Brandon II* decision issued after the D.C. Circuit denied enforcement of *Brandon I*.

in *Brandon II* that the union's large inflatable rat did not constitute picketing where the rat was located at a significant distance from the hospital entrance, and where its attendants did not physically or verbally accost hospital patrons. *Id.* at 1290-1292. The Board found that there was insufficient confrontation to render the conduct unlawful. *Id.* at 1292. Notably though, the Board majority acknowledged that "the size of a symbolic display combined with its location and threatening or frightening features *could* render it coercive within the meaning of Section 8(b)(4)(ii)(B)." *Id.* at 1294 (emphasis added).

As he had done in *Eliason & Knuth*, Member Hayes dissented in *Brandon II* and found that the union's use of an inflatable rat balloon, "a well known symbol of labor unrest," was tantamount to picketing. *Id.* at 1296. 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.*

### 3) The Board wrongly decided *Eliason & Knuth* and *Brandon II*

Counsel for the General Counsel submits that *Eliason & Knuth* and *Brandon II*, restricting the definition of picketing to circumstances where union agents carry picket signs while patrolling, were wrongly decided. The Board majority in both cases inappropriately departed from the Board's previously broad and flexible definition of picketing and should be

overruled. The dissents in those cases accurately argued that the placement of union agents with large banners or inflatable rats at the entrances to neutral businesses unlawfully sought to dissuade the public from entering those neutral businesses through coercive conduct, rather than through a persuasive message. *Eliason & Knuth*, *supra* at 815-16; *Brandon II*, *supra* at 1296-97. Therefore the union's use of the large inflatable rat and stationary banners should have been considered tantamount to picketing under well-established law.

#### **IV. Legal Argument**

##### *A. Local 150 Does Not Have a Primary Labor Dispute with Maglish*

Record evidence demonstrates that there is no primary labor dispute between Local 150 and Maglish. Local 150 has never represented Maglish employees, has never attempted to organize Maglish employees, and has never had discussions with Maglish about Maglish employees' terms and conditions of employment. (Tr. 32-33) The central consideration when determining whether a primary labor dispute exists is whether, "the union's conduct is intended to benefit the targeted employer's employees or whether the conduct is intended to satisfy the union's objectives elsewhere. *National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612, 644-645 (1967); *See also NLRB v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Maching, and General Pipefitters of New York and Vicinity, Local Union No. 638*, 429 U.S. 507, 528 (1977) ("the issue is whether 'an object' of the inducement and the coercion was to cause the cease-doing-business consequences prohibited by s 8(b)(4), the resolution of which in turn depends on whether the product boycott was 'addressed to the labor relations of [the employer] . . . vis-à-vis his own employees,' or whether the union's conduct was 'tactically calculated to satisfy objectives elsewhere'"). In this case, Local 150's

conduct was clearly intended to “satisfy [its] objectives elsewhere” and not to benefit Maglish’s employees in any way.

Local 150 will attempt to argue that the events on October 3, 2018 formed the basis of a primary labor dispute between Maglish and Local 150, but the evidence fails to support such a contention.<sup>6</sup> Local 150 asserts that it has a primary labor dispute with Maglish because Carroll called the police while Local 150 was lawfully picketing Davis & Sons on October 3, 2018, which resulted in the filing of an unfair labor practice charge on December 7, 2018. (Tr. 16) However, neither Local 150’s picketing nor Carroll’s calling the police on October 3 had anything to do with Maglish employees or their terms and conditions of employment.

Carroll had no experience whatsoever with Local 150 prior to October 3, 2018, and their interaction on October 3 concerned only a dispute between Local 150 and Davis & Sons. Local 150 was lawfully picketing Davis & Sons at the Division Road Jobsite while Davis & Sons was present. Nonetheless, Carroll believed, in good faith, that Local 150 was trespassing on his property and interfering with traffic on busy Division Road, so he called the police. (Tr. 36-37, 40, GC Ex. 1(f)) A police officer came to the site but did not ask Local 150 to leave the Division Road Jobsite and Local 150 never had to stop picketing. (Tr. 37) Yet, the very next day Local 150 started picketing Maglish with the giant scary rat and banners declaring, “Gary the Lying Rat,” and shaming Maglish for “harboring rat contractors.” (Tr. 9-10, 14-15, 23-24, GC Ex. 1(f)) Only after Carroll filed the present charge on November 2, 2018, did Local 150 decide to file its

---

<sup>6</sup> Local 150 may also argue that by doing business with Davis & Sons, Maglish somehow has a primary dispute with Local 150, but that is simply not the case. *See Denver Building and Construction Trades Council*, 341 U.S. 675, 687 (1951) (“it would not be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of, or does business with employer B”). Carroll’s contracting with Davis & Sons is not enough to create a primary labor dispute with Maglish.

own unfair labor practice charge on December 7, 2018, complaining that Carroll interfered with its lawful activity. (GC Ex. 1(a), GC Ex. 1(f))

While it is true that Carroll's call to the police was found to be an unfair labor practice, Carroll's interference with Local 150's conduct did not interfere with his own employees' rights. (Tr. 8, 14, 18, GC Ex. 1(f)) Local 150 had no interest in the labor relations between Maglish and Maglish employees before or after Carroll called the police; thus, Carroll's action did not create a primary labor dispute. What it did was anger Local 150 agents, who decided to retaliate by picketing Maglish, not to benefit Maglish employees, but rather to satisfy Local 150's ultimate objective of hurting Davis & Sons by threatening and coercing Maglish to cease doing business with the primary Davis & Sons.

*B. Local 150's Use of the Rat and Banners, Separately and Together, at the Maglish Shop and the Division Road Jobsite was Tantamount to Picketing and Violated Section 8(b)(4)(i) and (ii)(B)*

Local 150's behavior at the Maglish Shop and the Division Road Jobsite is tantamount to picketing. It is undisputed that Local 150 inflated a menacing rat standing 12 feet tall, staked into the ground a large banner, approximately 8 feet long by 3 feet tall, proclaiming "SHAME ON MAGLISH FOR HARBORING RAT CONTRACTORS," posted a 16 inch by 24 inch sign on the rat's chest declaring, "Gary the Lying Rat," and parked multiple vehicles near the Maglish Shop on October 4 and October 5, 2018. (Tr. 9-10, 14-15, 23-24, Jt. Exs. 1, 2, 3, GC. Ex. 1(f)) It is also undisputed that Local 150 put up the same rat with the same sign on its chest, staked the same banner, and parked vehicles at the Division Road Jobsite every day from October 8 to October 18, 2018. (Tr. 10-11, 15, 28-30, Jt. Ex. 4, GC Ex. 1(f))

From October 4 to October 5, 2018, Local 150 strategically posted the inflatable rat, sign, banner, and vehicles along busy road Route 20, about 500 feet from the Maglish Shop. (Tr.

23, 26, 28) Thus, Maglish employees inevitably encountered the large hostile rat, sign, oversize stationary banner, and the parked vehicles when coming and going from the Maglish Shop. Indeed, Carroll passed by the display both days around 7:30 am on his way to work. (Tr. 23, 25) Local 150's display signaled a labor dispute, indicating to Maglish employees that they should withhold their services and threatening Maglish to cease doing business with Davis & Sons or Local 150 would continue to target it. *See Eliason & Knuth, supra* at 815 (Members Schaumber and Hayes, dissenting); *Brandon II, supra* at 1296 (Member Hayes, dissenting) (display of rat “now frequent in labor disputes, constitutes a signal to third parties that there is, in essence, an invisible picket line that should not be crossed”).

Then on Monday, October 8, 2018 and for ten days thereafter, Local 150 moved its display to the Division Road Jobsite, and posted the rat, sign, banners, and vehicles there every day thereafter until October 18, 2018. (Tr. 10-11, 15, 28-30, Jt. Ex. 4, GC Ex. 1(f)) The display indicated to all contractors and employees working at the Division Road Jobsite, as well as neighbors and members of the public passing by, that there was a labor dispute and they should cease work and/or cease doing business with Maglish. Local 150 did so to satisfy its objectives elsewhere. *See National Woodwork Manufacturer's Association v. N.L.R.B.*, 386 U.S. 612, 644-645 (1967). Local 150 could not lawfully picket Davis & Sons at that jobsite from October 8 through 18 because Davis & Sons was not performing work at the Division Road Jobsite during that time. Consequently, Local 150 did the next best thing – picketed Maglish in order to coerce the neutral employer to cease doing business with Davis & Sons. *See, e.g., Sheet Metal Workers Local 19 (Delcard Associates)*, 316 NLRB 426, 437-438 (1995) *affirmed in relevant part*, 154 F.3d 137 (3d Cir. 1998); *Stoltze Land & Lumber*, 156 NLRB 388, 394 (1965); *Jeddo Coal Co.*,

*supra* at 686 (same); *Trinity Maintenance*, *supra* at 743 (same); *Kansas Color Press*, 169 NLRB 279, 283 (1983) (same).

Local 150's placement of an intimidating 12-foot menacing rat at the Maglish Shop on October 4 and 5, 2018 and at the Division Road Jobsite from October 8 through 18, 2018 was tantamount to picketing as the rat created a symbolic confrontational barrier to anyone driving to either location. In addition to the use of the inflatable rat, Local 150's posting of the "Gary the Lying Rat" sign and erection of a large stationary banner saying, "SHAME ON MAGLISH FOR HARBORING RAT CONTRACTORS" further demonstrates Local 150's intent to create a confrontational barrier to contractors, employees, and anyone else seeking to enter the jobsite. *See Eliason & Knuth*, *supra* at 815 (Members Schaumber and Hayes, dissenting); *Brandon II*, *supra* at 1296 (Member Hayes, dissenting) (display of rat "now frequent in labor disputes, constitutes a signal to third parties that there is, in essence, an invisible picket line that should not be crossed").

Through its use of the large inflatable rat, sign, and oversized banner, Local 150 signaled to Maglish employees going to the Maglish shop or working at the Division Road Jobsite that they should withhold their services. Like the union in *Delcard Associates*, Local 150 "intentionally sought to create the impression" for Maglish employees that Maglish was an unfair employer and the Division Road Jobsite was "an unfair job." *supra* at 437-438 Thus, Local 150 was engaged in unlawful signal picketing and thereby unlawfully induced and encouraged neutral Maglish's employees as well as any other neutral contractors on the Division Road Jobsite to cease work. *See Samuel Langer*, 341 U.S. 694, 699-704 (1951); *Telephone Man*, 327 NLRB 593, 593 (1999); *General Maintenance Co.*, 329 NLRB 638, 638-639 & n. 10 (1999).

Local 150's use of the large inflatable rat, sign, and banner at the Maglish Shop and the Division Road Jobsite also served to threaten, coerce, or restrain neutral Maglish to cease doing business with Davis & Sons. Upon encountering a large, menacing inflatable rat, a sign declaring Carroll to be a liar, and a large banner prominently identifying Maglish as a rat employer, employees and passersby would likely stay away to avoid confrontation. Potential Maglish clients would see the large rat looming near the entrance with banners declaring Maglish to harbor rat contractors and Carroll to be a liar, and simply decide not to do business with Maglish. Similarly at the Division Road Jobsite, employees, contractors, neighbors, and passersby might decide they don't want to do business with Maglish or Carroll himself upon seeing the unmistakable display. *See Eliason & Knuth, supra* at 816 (Members Schaumber and Hayes, dissenting) (“[a]version and avoidance are characteristic behaviors of persons being threatened, restrained, or coerced”). In that case, Maglish would have no choice but to cease doing business with Davis & Sons, which is precisely what Local 150 intended.

Accordingly, Respondent's use of a large hostile inflatable rat, sign, and oversize stationary banner at the Maglish Shop on October 4 and 5, 2018 and at the Division Road Jobsite from October 8 through 18, 2018, separately and together, were tantamount to unlawful secondary picketing and should be found to have violated Section 8(b)(4)(i) and (ii)(B). *General Maintenance Co., supra* at 638-639 (picketing at neutral employers' premises has the “foreseeable consequence” of unlawfully inducing or encouraging neutral's employees to withhold their labor); *Brandon II, supra* at 1294, (Member Hayes, dissenting) (“the size of a symbolic display combined with its location and threatening or frightening features *could* render it coercive within the meaning of Section 8(b)(4)(ii)(B)”). The First Amendment does not protect unlawful secondary conduct prohibited by Section 8(b)(4) of the Act. *DeBartolo II, supra* at 579-

80; *Safeco Title Ins. Co.*, 447 U.S. 607, 616 (1980); *see also*, *Samuel Langer*, *supra* at 705 (secondary picketing, as well as phone call emphasizing the purpose of the picketing, not protected by the First Amendment).

Local 150 may argue that its banner, shaming Maglish for “harboring rat contractors,” a reference to Maglish’s contracting with Davis & Sons at the Division Road Jobsite, was intended to inform the public about Maglish’s business relationship with Davis & Sons and other non-union contractors, though, notably no sign identified Davis & Sons or any other non-union contractors. Local 150 will also argue it posted the sign declaring, “Gary the Lying Rat” because Carroll lied to the police about Local 150’s conduct on October 3, 2018 though Carroll’s statements to the police were based on his belief that Local 150 was trespassing on his property and interfering with traffic.

Nevertheless, even if Local 150 intended to inform the public about Maglish’s use of unidentified “rat contractors” or that Carroll lied to the police, *an* object of Local 150’s conduct was to encourage Maglish employees and employees of other contractors to cease work and to threaten and coerce Maglish to cease doing business with Davis & Sons. *Intercontinental Hotels*, 286 NLRB 680, 685 (1987) (“if one of the objects of the picketing was unlawful, it is immaterial that [the union] had a legitimate interest in protesting” other matters).<sup>7</sup> Furthermore, unlike the handbilling in *DeBartolo II*, 485 U.S. 568 (1988), Local 150 did not simply seek to persuade the public about the justice of its cause by disseminating information in a non-confrontational manner. Rather, Local 150 sought to dissuade the public from doing business with a neutral

---

<sup>7</sup> *See also* *Brown & Root USA, Inc.*, 319 NLRB 1009, 1109 (1995) (“as long as at least one object of picketing is shown by the weight of credible evidence to be unlawful”); *Mine Workers District 29 v. NLRB*, 977 F.2d 1470, 1471 (D.C. Cir. 1992) (“one object of the picketing, even if not the sole object, was to induce the [neutral business] to cease doing business with the [primary employer's] employees”); *Denver Building Trades and Construction Council*, *supra* at 689 (“it is not necessary to find that the sole object of the strike was that of forcing the contractor to terminate the subcontractor's contract”).

employer through intimidation and coercion. *Eliason & Knuth, supra* at 817-818 (Members Schaumber and Hayes, dissenting).

*C. Even if Local 150's Conduct at the Maglish Shop and the Division Road Jobsite Did Not Constitute Picketing, the Conduct was Nevertheless Unlawfully Coercive and Violated Section 8(b)(4)(ii)(B)*

Local 150's entire course of conduct from October 4 through October 18, 2018, even if not tantamount to picketing, was nevertheless unlawful coercion, threats, or restraint within the meaning of Section 8(b)(4)(ii)(B). Local 150's conduct was clearly intended to, and in fact did, enmesh neutral employer Maglish into Local 150's labor dispute with Davis & Sons. At the Maglish Shop, the inflatable rat was strategically placed on the same road as the facility but at the intersection of particularly busy Route 20. Maglish employees coming from and going to work, potential Maglish customers, and any passersby could not avoid the large scary rat looming a off the road. Likewise, at the Division Road Jobsite the inflatable rat was placed only 5 feet from busy the busy road, so neighbors, contractors and their employees building the home, and any passersby had no choice but to face the hostile display.

The sign declaring "Gary the Lying Rat" and prominently placed on the rat's chest at both locations enhanced Local 150's coercive message by sending a clear message to anybody unable to avoid the display that Gary Carroll is untrustworthy, and you should refrain from doing business with Maglish. Similarly, Local 150's posting of the large, noticeable banner helped to further spread its coercive secondary message. The message on the banner, "SHAME ON MAGLISH FOR HARBORING RAT CONTRACTORS," let Carroll know that if he didn't stop "harboring rat contractors," i.e. stop doing business with Davis & Sons, Local 150 was going to harm his business. Nothing on the sign or the banner identified who the "rat contractors" were or mentioned the basis for a labor dispute with Maglish. Thus, it is apparent Local 150 intended to

signal to Maglish employees, other contractors and their employees, as well as the public that Maglish operates unfair jobs, is dishonest, and is unworthy of patronage. Local 150 undertook these actions to coerce Maglish to cease doing business with Davis & Sons.

Hence, consistent with the longstanding Board law discussed above, Local 150's conduct here – the posting of an enormous intimidating rat wearing a sign declaring Carroll to be a liar, bright oversized banner shaming neutral employer Maglish for “harboring rat contractors,” and parking vehicles near said rat and banners at the Maglish Shop for two consecutive days and at the Division Road Jobsite for ten consecutive days – “overstepped the bounds of propriety and went beyond persuasion so that it became coercive to a very substantial degree.” *William J. Burns Agency*, 136 NLRB 431, 436-437 (1962); *See also Society Hill Towers Owners' Assn.*, 355 NLRB 814, 820-823 (2001); *General Maintenance Co.*, *supra* at 664-665, 680. Here, Local 150's conduct was confrontational and, because of the number of days and locations the rat, sign, and banner were posted, more coercive than the conduct found to be lawful in *Eliason* and *Brandon II*. Accordingly, the evidence supports a finding that under current Board law Respondent's conduct from October 4 through October 18, 2018 at the Maglish Shop and the Division Road Jobsite was unlawfully coercive in violation of Section 8(b)(4)(ii)(B).

#### *D. Local 150's Conduct is Not Protected by the First Amendment*

Because Local 150 engaged in conduct tantamount to unlawful secondary picketing, First Amendment concerns are not implicated, as it is settled law that the First Amendment does not shield unlawful secondary picketing. *DeBartolo II*, *supra* at 579-580; *Safeco Title Ins. Co.*, *supra* at 616; *Samuel Langer*, *supra*.

Likewise, a finding that the conduct here was not tantamount to picketing but was otherwise unlawfully coercive fails to raise First Amendment concerns since Local 150's

conduct is entitled to lesser First Amendment protection because it is labor and/or commercial speech. The Government has a heightened interest in regulating labor speech because of its direct effect on interstate commerce. See *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Sperry*, 170 F.2d 863 (10<sup>th</sup> Cir. 1948). Commercial speech is deserving of its “subordinate position in the scale of First Amendment values,” because much of it is not in the public interest. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978), *cf.*, *Virginia Citizens Consumer Council*, *supra* at 761 (the advertisement at issue did not seek to “editorialize on any subject, cultural, philosophical, or [po]litical”).

Here, Local 150’s coercive conduct sought to entangle a neutral business in a labor dispute not its own and thus spread labor discord in exactly the way Congress sought to prohibit. To the extent this conduct involved “speech,” it was labor speech, and was therefore entitled to lesser First Amendment protection. The gravamen of Local 150’s overall conduct was to convey to Maglish’s employees, customers, and potential customers that Maglish was undeserving of their business as opposed to pressing some public benefit. As such, Respondent’s “speech” constituted commercial speech arguing the merits of Maglish’s business and is entitled to lesser constitutional deference for that reason, as well.

## **V. Conclusion and Remedy**

For the reasons stated above, Counsel for the General Counsel respectfully requests that the Administrative Law Judge (“ALJ”) find Respondent’s aforementioned conduct to be in violation of the Act and recommend an appropriate remedy for said violations.

Specifically, Local 150 erected an imposing inflatable rat wearing a sign declaring, “Gary the Lying Rat,” displayed a large conspicuous banner, which identified neutral Maglish as “harboring rat contractors” but failed to clearly identify Davis & Sons with whom it has a

primary labor dispute, and parked vehicles around the inflatable rat and banners in two locations from October 4 through October 18, 2018. On October 4<sup>th</sup> and October 5<sup>th</sup>, Local 150 strategically placed its display on the corner of busy Route 20 and Old Porter Road, approximately 500 feet from the Maglish Shop, and each day from October 8<sup>th</sup> and October 18<sup>th</sup>, Local 150 set up the display at the Division Road Jobsite where contractors and employees were building Carroll's personal residence. Local 150's posting of the inflatable rat, separately and together with its posting of the sign and the stationary banner, are tantamount to unlawful secondary picketing, and by these actions, Respondent unlawfully induced employees of neutral employer Maglish to cease work in violation of Section 8(b)(4)(i)(B) and unlawfully threatened and coerced Maglish to cease doing business with Davis & Sons in violation of Section 8(b)(4)(ii)(B) of the Act. In the alternative, even if this conduct is not found to be tantamount to picketing, by placing the inflatable rat, sign, and banner at the Maglish Shop and the Division Road Jobsite, Local 150's conduct constituted unlawfully coercive non-picketing conduct in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

Counsel for the General Counsel respectfully requests that the ALJ order Respondent to post at its offices, notices containing assurances that Respondent shall not repeat the unfair labor practices found herein and shall remedy them as ordered. Counsel for the General Counsel further requests that such notice include the language found in Appendix A.

Respectfully submitted,

Dated: June 28, 2019

*/s/ Tiffany J. Limbach*

---

Tiffany J. Limbach

Counsel for the General Counsel  
National Labor Relations Board  
Region 25  
575 North Pennsylvania St., Room 238  
Indianapolis, IN 46204  
(317) 991-7960  
tiffany.limbach@nlrb.gov

APPENDIX A

**NOTICE TO MEMBERS  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
AN AGENCY OF THE UNITED STATES GOVERNMENT**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union;
- Choose a representative to bargain with your employer on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

**WE WILL NOT** restrain or coerce you in the exercise of the above rights.

**WE WILL NOT**, by displaying an inflatable rat or other inflatable object and displaying large stationary banners and signs or by any like or related acts or conduct, induce or encourage Maglish Plumbing, Heating, and Electric, LLC employees, or any other employees, to withhold their services from their employer or threaten, restrain, or coerce Maglish Plumbing, Heating, and Electric, LLC, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Maglish Plumbing, Heating, and Electric, LLC, or any person engaged in commerce or in industry affecting commerce to cease doing business with Davis & Sons Excavation, LLC, or with any other person.

**WE WILL NOT** in any like or related manner threaten, coerce, or restrain you in the exercise of your rights under Section 7 of the Act.

**INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL UNION NO. 150**

\_\_\_\_\_  
(Labor Organization)

**Dated:**

**By:**

\_\_\_\_\_

(Representative)

(Title)

---

*The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at <https://www.federalrelay.us/tty> (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.*

**Telephone:**  
**Hours of Operation:**

---

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing General Counsel's Brief to the Administrative Law Judge Has been filed electronically with the Division of Judges through the Board's E-Filing System this 28<sup>th</sup> day of June 2019. Copies of the filing are being served upon the following persons by electronic mail:

Charles R. Kiser, Esq.  
International Union of Operating Engineers,  
Local Union No. 150, AFL-CIO  
6140 Joliet Road  
Countryside, IL 60525  
ckiser@local150.org

*/s/ Tiffany J. Limbach*

---

Tiffany J. Limbach  
Counsel for the General Counsel  
National Labor Relations Board  
Region 25  
575 North Pennsylvania St., Room 238  
Indianapolis, IN 46204  
(317) 991-7960  
tiffany.limbach@nlrb.gov