

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and

Case 25-CC-230368

MAGLISH PLUMBING, HEATING & ELECTRIC,
LLC.

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respectfully submitted,

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Table of Contents

I. Introduction 1

II. Specification of Issues..... 5

1) Did the Judge err in finding that Respondent’s conduct was not tantamount to picketing in violation of Sections 8(b)(4)(i) and (ii)(B) of the Act? (*Exceptions 1, 2, 4, 5, 6, 7, 8, 9, and 10*)..... 5

2) Did the Judge err in finding that Respondent’s conduct was not otherwise unlawfully coercive in violation of Sections 8(b)(4)(i) and (ii)(B) of the Act? (*Exceptions 1, 6, 7, 8, 9, and 10*) 5

3) Did the Judge err in declining to overrule Carpenters Local 1506 (Eliason & Knuth), 355 NLRB 797 (2010) and Sheet Metal Workers Local 15 (Brandon Medical Center), (Brandon II.), 356 NLRB 1290 (2011)? (*Exception 2*) 5

4) Did the Judge err in finding that Respondent’s conduct was protected by the First Amendment? (*Exception 3*) 5

III. Statement of Facts 5

A. *International Union of Operating Engineers, Local 150*..... 5

B. *Maglish Plumbing, Heating and Electric*..... 5

C. *Davis & Sons Excavation, LLC*..... 6

D. *October 3, 2018, Local 150 Picketing Davis & Sons*..... 6

E. *Local 150 starts Picketing Maglish*..... 7

IV. Argument 9

A. *Secondary Picketing and Other Coercive Conduct are Unlawful under Sections 8(b)(4)(i) and (ii) of the Act*..... 9

B. *Section 8(b)(4)’s Proscriptions Against Secondary Picketing Are Lawful and Consistent with the First Amendment*..... 13

C. *The Judge Erred in Failing to Find Respondent’s Conduct Tantamount to Picketing in Violation of Sections 8(b)(4)(i) and (ii)(B)(Exceptions 1, 2, 4, 5, 6, 7, 8, 9, 10)* 15

D. *The Judge Erred in Failing to Find Respondent’s Conduct Unlawfully Coercive in Violation of Sections 8(b)(4)(i) and (ii)(B) of the Act (Exceptions 1, 6, 7, 8, 9, 10)*..... 19

E. *The Board’s Decisions in Eliason & Knuth and Brandon II Were Wrongly Decided and Should be Overruled (Exception 2)* 21

F. *The Judge Erred in Finding that Local 150’s Conduct Was Protected by the First Amendment (Exception 3)* 26

V. Conclusion and Remedy..... 27

Table of Authorities

Cases

<i>Brown & Root USA, Inc.</i> , 319 NLRB 1009, 1109 (1995)	11, 19
<i>Carpenters Kentucky District Council (Wehr Constructors)</i> , 308 NLRB 1129 (1992)	23
<i>Carpenters Local 1506 (Eliason & Knuth)</i> , 355 NLRB 797 (2010)	passim
<i>Construction and General Laborers Union No. 330 v. Town of Grand Chute</i> , 915 F.3d 1120 (7th Cir. 2019)	13
<i>Edward J. DeBartolo Corp. v. Florida Gulf Trades Building & Construction Trades Council (DeBartolo II)</i> , 485 U.S. 568 (1988).....	passim
<i>Giboney v. Empire Storage & Ice Co.</i> , 336 U.S. 490 (1949).....	15
<i>International Brotherhood of Electrical Workers Local 501 (Samuel Langer) v. NLRB</i> , 341 U.S. 694 (1951)	13, 18, 26
<i>International Brotherhood of Electrical Workers, Local 6 (Intercontinental Hotels)</i> , 286 NLRB 680 (1987)	11, 19
<i>International Brotherhood of Electrical Workers, Local 98 (Telephone Man)</i> , 327 NLRB 593 (1999).....	12, 18
<i>Iron Workers Pacific Northwest Council (Hoffman Construction)</i> , 292 NLRB 562 (1989), <i>enfd.</i> , 913 F.2d 1470 (9th Cir. 1990)	22
<i>Laborers Local 389 (Calcon Construction Co.)</i> , 287 NLRB 570 (1987).....	11
<i>Lawrence Typographical Union 570 (Kansas Color Press)</i> , 169 NLRB 279 (1968), <i>enfd.</i> , 402 F.2d 452 (10th Cir. 1968)	3, 11, 17, 22
<i>Longshoremen (ILA) v. Allied International, Inc.</i> , 456 U.S. 212 (1982)	15
<i>Lumber & Sawmill Workers Local Union No. 2797 (Stoltze Land & Lumber Co.)</i> , 156 NLRB 388 (1965)	3, 11, 17, 22
<i>Metropolitan Regional Council, Carpenters (Society Hill Towers Owners' Assn.)</i> , 335 NLRB 814 (2001), <i>enfd.</i> , 50 F. App'x 88 (3d Cir. 2002)	13, 21, 23
<i>Mine Workers District 12 (Truax-Traer Co.)</i> , 177 NLRB 213 (1969).....	12
<i>Mine Workers District 29 v. NLRB</i> , 977 F.2d 1470 (D.C. Cir. 1992)	11, 19
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982).....	14
<i>National Society of Professional Engineers v. United States</i> , 435 U.S. 679 (1978)	15
<i>National Woodwork Manufacturer's Association v. N.L.R.B.</i> , 386 U.S. 612 (1967)	10, 17
<i>NLRB v. Denver Building and Construction Trades Council</i> , 341 U.S. 675 (1951)....	9, 10, 11, 19
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 595, 618 (1969)	14

<i>NLRB v. Operating Engineers Local 825 (Burns & 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).....	10, 14, 24, 26
<i>NLRB v. Retail Store Employees</i> , 447 U.S. 607 (1980).....	14, 15
<i>NLRB v. Teamsters Local 182 (Woodward Motors)</i> , 314 F.2d 53 (2d Cir. 1963), <i>enf'g</i> , 135 NLRB 851 (1962).....	11
<i>NLRB v. United Furniture Workers</i> , 337 F.2d 936 (2d Cir. 1964).....	23
<i>Ohralik v. Ohio State Bar Association</i> , 436 U.S. 447 (1978).....	27
<i>Painters District Council 9 (We're Associates, Inc.)</i> , 329 NLRB 140 (1999).....	11, 12
<i>Service Employees Local 399 (William J. Burns Agency)</i> , 136 NLRB 431 (1962).....	13, 21
<i>Service Employees Local 525 (General Maintenance Co.)</i> , 329 NLRB 638 (1999).....	13, 18, 21
<i>Service Employees Union, Local 87 (Trinity Maintenance)</i> , 312 NLRB 715 (1993), <i>enfd.</i> 103 F.3d 139 (9th Cir. 1996).....	passim
<i>Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)</i> , 356 NLRB 1290 (2011).....	passim
<i>Sheet Metal Workers Local 15 (Brandon Regional Medical Center) (Brandon I)</i> , 346 NLRB 199 (2000), <i>enf. den.</i> , 491 F.3d 429 (D.C. Cir. 2007).....	25
<i>Sheet Metal Workers Local 19 (Delcard Associates)</i> , 316 NLRB 426 (1995) <i>affirmed in relevant part</i> , 154 F.3d 137, 139, n.3 (3d Cir. 1998).....	12, 17, 18
<i>Sheet Metal Workers Local 48 v. Hardy Corp.</i> , 332 F.2d 682 (5th Cir. 1964).....	23
<i>United Brotherhood of Carpenters and Joiners of America v. Sperry</i> , 170 F.2d 863 (10th Cir. 1948).....	14, 26
<i>United Mine Workers of America (New Beckley Mining)</i> , 304 NLRB 71 (1991), <i>enfd.</i> , 977 F.2d 1470 (D.C. Cir. 1992).....	12
<i>United Mine Workers of America, District 2 (Jeddo Coal Co.)</i> , 334 NLRB 677 (2001).....	passim
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968).....	15
<i>Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council</i> , 425 U.S. 748 (1976).....	14, 24, 26, 27
Statutes	
29 U.S.C. § 158(b)(4)(i) & (ii)(B).....	10
Other Authorities	
H.R. Rep. No. 510, 80th Cong., 1st Sess. 43.....	9

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Comes now Counsel for the General Counsel and respectfully submits this Brief in Support of Exceptions to the decision of the Administrative Law Judge issued in this matter on October 16, 2019.

I. Introduction

Administrative Law Judge Kimberly R. Sorg-Graves issued her decision in this case on October 16, 2019. Although the Judge correctly found that no primary labor dispute existed between International Union of Operating Engineers, Local Union No. 150 (“Local 150” or “Respondent”) and Maglish Plumbing, Heating, & Electric, LLC (“Maglish” or “Charging Party”), she erred in concluding that Respondent did not violate Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (“Act”) when it displayed an imposing inflatable rat with a sign hanging on its chest declaring, “Gary the Lying Rat” and displayed a large conspicuous banner, stating “SHAME ON MAGLISH FOR HARBORING RAT CONTRACTORS” near Maglish’s

place of business in Portage, Indiana (“Maglish Shop”) on October 4 and 5, 2018 and in front of the construction jobsite of 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 intent to induce or encourage the neutral employer’s employees to cease work and to threaten, coerce, or restrain the neutral employer to cease doing business with others.

Local 150’s posting of the inflatable rat, separately and together with its posting of the sign and 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 Excavation, LLC (“Davis & Sons”) in violation of Section 8(b)(4)(ii)(B) of the Act. Even if Respondent’s conduct is not tantamount to picketing, it constituted unlawfully coercive non-picketing conduct in violation of Section 8(b)(4)(i) and (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.

At its core, this case is about confrontational conduct, which Respondent directed at an innocent secondary employer in order to force it, through any means possible, to cease doing business with Davis & Sons, with whom Local 150 has a primary labor dispute. The means Respondent used to achieve such an end were tantamount to secondary picketing and unlawfully coercive, and by engaging in the essentially undisputed conduct, Local 150 violated Section 8(b)(4)(i) and (ii)(B) of the Act. Thus, Counsel for the General Counsel takes exception to various findings and conclusions in the Judge’s decision and respectfully urges the Board to conclude that Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act for the reasons outlined herein.

First, in accordance with the Board's historically broad and flexible definition of picketing, Respondent's conduct here – posting a giant inflatable rat, sign, and stationary banner at the Maglish Shop and at the Division Road Jobsite – was tantamount to unlawful secondary picketing. *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). Furthermore, even if the Board disagrees that Respondent's conduct was picketing, it was nevertheless unlawfully coercive in its totality, as Respondent clearly intended to exert sufficient pressure on neutral Maglish to cause harm to the primary employer Davis & Sons, who had no presence at the Maglish Shop and was present at the Division Road Jobsite on a very limited basis when the rat and banner were displayed.

Second, Counsel for the General Counsel urges the Board to overturn both *Carpenters Local 1506 (Eliason & Knuth)*, 355 NLRB 797 (2010) and *Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)*, 356 NLRB 1290 (2011) as contrary to the dictates of Section 8(b)(4) and inconsistent with decades of Board law. The Board should overturn those decisions and, returning to standards and principles that hew more closely to the language and intention of the Act, should conclude that the conduct engaged in by Respondent here is unlawful under Section 8(b)(4). As discussed below, these decisions are not only inconsistent with the meaning and intent of the Act in preventing coercive secondary boycotts, but also have created confusion rather than clarity for labor disputants. The standards articulated in *Eliason & Knuth* and *Brandon II* are vague and provide no guidance to determine the line between lawful and unlawful conduct. For these reasons alone, the holdings in these decisions should be overturned.

Finally, First Amendment concerns are not implicated in this case, inasmuch as it is settled law that the First Amendment does not shield unlawful secondary picketing. Unlike handbilling, the use of inflatable rats in the circumstances here is not constitutionally protected speech under *Edward J. DeBartolo Corp. v. Florida Gulf Trades Building & Construction Trades Council (DeBartolo II)*, 485 U.S. 568, 579-80 (1988). In *DeBartolo II*, the Supreme Court held that distributing leaflets was protected speech because there was no intimidation or confrontation accompanying the distribution of the leaflets and the only message conveyed was that contained in the words of the handbills. In contrast, posting a giant inflatable rat at or near a neutral's business or jobsite, whether or not considered picketing, is confrontational, threatening, and coercive. To the extent that displaying inflatable rats can be considered non-picketing *speech*, it is not lawful under the Act and not protected under the First Amendment because they are used specifically to menace, intimidate, and coerce in order to achieve an unlawful purpose – a secondary boycott.

II. Specification of Issues

- 1) Did the Judge err in finding that Respondent's conduct was not tantamount to picketing in violation of Sections 8(b)(4)(i) and (ii)(B) of the Act? (*Exceptions 1, 2, 4, 5, 6, 7, 8, 9, and 10*)
- 2) Did the Judge err in finding that Respondent's conduct was not otherwise unlawfully coercive in violation of Sections 8(b)(4)(i) and (ii)(B) of the Act? (*Exceptions 1, 6, 7, 8, 9, and 10*)
- 3) Did the Judge err in declining to overrule Carpenters Local 1506 (Eliason & Knuth), 355 NLRB 797 (2010) and Sheet Metal Workers Local 15 (Brandon Medical Center), (Brandon II.), 356 NLRB 1290 (2011)? (*Exception 2*)
- 4) Did the Judge err in finding that Respondent's conduct was protected by the First Amendment? (*Exception 3*)

III. Statement of Facts

A. International Union of Operating Engineers, Local 150

Within the meaning of the Act, Local 150 is a labor organization, 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 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 a fairly busy county road. (Tr. 27) As general contractor, Carroll obtains 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 it delivered sand on October 3, 2018, and it is certain that Davis & Sons did not perform any work after October 12, 2018, when it removed a bulldozer 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. A few 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 the Davis & Sons driver 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.”

The first agent who arrived at the Division Road Jobsite was Jake Wetzel, and a second Local 150 agent arrived a bit 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, 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, and Carroll explained his grievance to the officer. The officer did not require Local 150 to leave, and Local 150 continued picketing Davis & Sons without further incident on October 3, 2018. (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, located at 5705 Old Porter Road in Portage, IN, 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 on his way 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 the banner announcing, “SHAME ON MAGLISH FOR HARBORING RAT CONTRACTORS.” (Tr. 25-26, Jt. Exs. 2, 3, GC Ex. 1(f))

The rat, sign, and banner were placed at the corner of Old Porter Road and Route 20 in Portage, Indiana, about 500 feet from the Maglish Shop on October 4 and 5, 2018. (Tr. 23, 26) Route 20 in particular is very 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 the “Gary the Lying Rat” sign attached and posted the same “Shame on Maglish” banner as had previously been posted near the Maglish shop 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 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, was brown with sharp claws on its

outstretched arms and showed its sharp teeth. (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)

IV. Argument

A. Secondary Picketing and Other Coercive Conduct are Unlawful under Sections 8(b)(4)(i) and (ii) of the Act

The Act prohibits picketing and other coercive conduct directed specifically at secondary or neutral entities. In *NLRB v. Denver Building and Construction Trades Council*, the Supreme Court discussed the difference between "primary" and "secondary" employers, and noted it was apparent from the legislative history that it was "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.'" 341 U.S. 675, 687 (1951) (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).

Concern over unions pressuring neutral secondary employers through picketing or otherwise coercive conduct prompted the enactment of Section 8(b)(4)(B), which is meant to simultaneously protect unions’ rights to exert legitimate pressure on employers with whom they have primary labor disputes 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)).

While both the union’s conduct and object must be unlawful to find a violation of Section 8(b)(4), it is not necessary to find that the *only* object of a union’s conduct was unlawful, “as 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).

Notably, 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). 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 a parked van with a sign on the outside of the 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. *Painters District Council 9 (We're Associates)*, 329 NLRB 140, 142 (1999) (citing *Trinity Maintenance, supra* at 743; *New Beckley Mining Co., supra* at 72; *Mine Workers District 12 (Truax-Traer Co.)*, 177 NLRB 213, 218 (1969)) (*see also Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797, 814-15 (2010) (Members Schaumber and Hayes, dissenting)).

The Board and courts have also held that union activity at a neutral's premises which falls short of traditional picketing may still send a "signal" to a neutral's employees that they should withhold their services in violation of Section 8(b)(4)(i)(B). 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 Construction and General Laborers Union No. 330 v. Town of Grand*

Chute, 915 F.3d 1120, 1121 (7th Cir. 2019) (noting that inflatable rats are “notable both for [their] symbolic meaning and for [their] size” and that they are “a familiar sight in certain parts of the country when a dispute breaks out between a union and an employer” and holding, *inter alia*, the town’s removal of the inflatable rat was lawful and pursuant to a nondiscriminatory ordinance).

Likewise, the Board has found other non-picketing conduct to be so coercive that it is unlawful within the meaning of Section 8(b)(4), 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.)*, 329 NLRB 638, 664-65, 680 (1999); 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”).¹

B. Section 8(b)(4)’s Proscriptions Against Secondary Picketing Are Lawful and Consistent with the First Amendment

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. *International Brotherhood of Electrical Workers Local 501 (Samuel Langer) v. NLRB*, 341 U.S. 694, 705 (1951) (secondary picketing, as well as phone call emphasizing the purpose of the picketing, not protected by the First Amendment); *see also*

¹ Two members of the Board majority in *William J. Burns Agency* would have labeled the union’s conduct as “picketing.”

Safeco Title Ins. Co., *supra* at 616 (“[a]s applied to picketing that predictably encourages consumers to boycott a secondary business, § 8(b)(4)(ii)(B) imposes no impermissible restrictions upon constitutionally protected speech”). As the Tenth Circuit has observed, “[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) (placement of neutral employer on blacklist, promulgation of the blacklist, and picketing the neutral employer unprotected by the First Amendment). “Secondary boycotts and picketing by labor unions may be prohibited, as part of ‘Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.” *Eliason & Knuth*, 355 NLRB 797 at 821 (dissent) (*quoting NLRB v. Retail Store Employees*, 447 U.S. 607, 617-618 (1980) (*Blackmun, J., concurring in part*)). As such, there is no constitutional barrier to prohibitions on such secondary boycotts and picketing.²

Furthermore, 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.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912

² Given the Act’s purpose to protect the free flow of interstate commerce, it is certainly arguable that certain forms of speech or conduct, including those at issue in the instant case, are more appropriately characterized as commercial speech entitled to lesser constitutional protections. The Supreme Court has long recognized that “[t]he speech of labor disputants, of course, is subject to a number of restrictions.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 (1976) (*citing NLRB v. Gissel Packing Co.*, 395 U.S. 595, 618 (1969)) (“The interests of contestants in a labor dispute are primarily economic”). While in *DeBartolo II*, the Supreme Court declined to read Section 8(b)(4)(ii)(B) as prohibiting a union’s handbilling, *supra* at 575-76, that decision is not inconsistent with the principle that coercive secondary conduct, whether or not classified as commercial speech, is unprotected by the First Amendment.

(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, businesses' 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); *Longshoremen (ILA) 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)).

Accordingly, nothing in the *DeBartolo II* decision or other Supreme Court precedent compels the Board to conclude that any activity or display involving elements of speech in aid of a secondary boycott is protected by the First Amendment and cannot violate Section 8(b)(4).

C. The Judge Erred in Failing to Find Respondent's Conduct Tantamount to Picketing in Violation of Sections 8(b)(4)(i) and (ii)(B) of the Act (Exceptions 1, 2, 4, 5, 6, 7, 8, 9, 10)

Local 150's behavior at the Maglish Shop and the Division Road Jobsite constitutes picketing. It is undisputed that Local 150 inflated a menacing rat standing 12 feet tall, hung a sign around the rat's neck declaring, "Gary the Lying Rat," and staked into the ground a large banner, approximately 8 feet long by 3 feet tall, proclaiming "SHAME ON MAGLISH FOR HARBORING RAT CONTRACTORS," 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 and staked the same banner every day at the Division Road Jobsite 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 parked vehicles along busy Route 20, about 500 feet from the Maglish Shop. (Tr. 23, 26, 28) Thus, Maglish employees inevitably encountered the large hostile rat, oversize stationary banners, 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) In her decision, the Judge noted that the record lacked evidence that the displays were specifically directed at Maglish employees because there was no information about when and how frequently employees went to the Maglish Shop. However, the question is whether Local 150 intended to encourage Maglish employees to cease work, and the mere act of placing the display at the Maglish Shop signals Respondent's intent to reach Maglish employees, as there is no other conceivable reason to locate the display there. Local 150's display identified Gary Carroll, one of Maglish's owners, as a rat and a liar, indicating to Maglish employees that they should cease working for "Gary the Lying Rat." Additionally, by setting up its display at the Maglish Shop and shaming Maglish for harboring "rat contractors," Local 150 was threatening Maglish with continued picketing if it did not to cease doing business with Davis & Sons. *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 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 of contractors working at the Division Road Jobsite, as well as members of the public passing by that there was a labor dispute and they should avoid the Division Road Jobsite and Maglish altogether. 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 intended to coerce Maglish to cease doing business with Davis & Sons because it could not lawfully picket Davis & Sons at that jobsite since Davis & Sons was not performing work at the Division Road Jobsite during that time. 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. Not only did Local 150 inflate an intimidating twelve-foot tall rat, which is an easily identifiable symbol of a labor conflict, Local 150 hung a sign around the rat's neck reading "Gary the Lying Rat" and erected a large stationary banner next to the rat saying, "SHAME ON MAGLISH FOR HARBORING RAT CONTRACTORS." Taken as a whole, Local 150's conduct demonstrates its intent to create a confrontational barrier to customers, employees, contractors, and anyone else going to the Maglish Shop or seeking to enter the Division Road 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 customers 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.

Accordingly, Respondent’s use of a 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)”).

Even if Local 150 sincerely intended to inform the public about Maglish’s use of unidentified “rat contractors” or that Carroll is a liar, *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).³ 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 employer through intimidation and coercion. *Eliason & Knuth, supra* at 817-818 (Members Schaumber and Hayes, dissenting).

D. The Judge Erred in Failing to Find Respondent’s Conduct Unlawfully Coercive in Violation of Sections 8(b)(4)(i) and (ii)(B) of the Act (Exceptions 1, 6, 7, 8, 9, 10)

Local 150’s entire course of conduct from October 4 through October 18, 2018, even if not picketing or 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

³ 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”).

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 driving to and from work, potential Maglish customers, and any other passersby could not avoid the large scary rat looming 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, and anyone else passing by likewise could not avoid the conspicuous display when driving past or entering the jobsite.

The "Gary the Lying Rat" sign was prominently placed on the rat's chest at both locations and enhanced Local 150's coercive message by clearly indicating to anybody confronted with the display that Gary Carroll is dishonest and unworthy of the person's business. Similarly, Local 150's posting of the large banner helped to further its coercive secondary message. The message on the banner, "SHAME ON MAGLISH FOR HARBORING RAT CONTRACTORS," informed Carroll 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 customers, employees, other contractors and their employees, and 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.

Thus, consistent with the longstanding Board law discussed above, Local 150's conduct here – the posting of an intimidating rat wearing a sign declaring Carroll to be a liar and the bright oversized banner shaming neutral employer Maglish for "harboring rat contractors" at the Maglish Shop for two consecutive days and then 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 given the number of days and locations the rat, sign, and banner were displayed, was distinguishable from 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)(i) and (ii)(B).

E. The Board’s Decisions in Eliason & Knuth and Brandon II Were Wrongly Decided and Should be Overruled (Exception 2)

Respondent’s conduct here – using the inflatable rat alone and in totality with the “Gary the Lying Rat” sign and stationary banner at two sites targeted to inflict significant harm to the neutral employer – constitutes picketing and is threatening and coercive in violation of Section 8(b)(4)(i) and (ii)(B). The most recent decisions addressing banners and inflatables— *Eliason & Knuth* and *Brandon II*—should be overturned and the Board should return to the principles of earlier Board law.⁴

In both *Eliason & Knuth* and *Brandon II*, the Board majority inappropriately departed from the Board’s previously broad and flexible definition of picketing. These decisions are inconsistent with the meaning and protections of Section 8(b)(4), prior Board law, and are not compelled or even supported by *DeBartolo II*. Further, these decisions should be overturned

⁴ Although an argument could be made that the conduct here is unlawful even under the Board’s decisions in *Carpenters Local 1506 (Eliason & Knuth)*, 355 NLRB 797 (2010) and *Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)*, 356 NLRB 1290 (2011)—based on the proximity of the displays to the neutral premises—it is unnecessary for the Board to reach this issue given the General Counsel’s position that those two cases should be overruled.

because the purported standards used to determine unlawful picketing are vague and imprecise and provide no guidance to labor disputants.

The Board majority in *Eliason & Knuth* 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 its 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 bannering was not equivalent to picketing, the *Eliason & Knuth* Board determined that the bannering was not otherwise coercive within the meaning of Section 8(b)(4)(ii)(B) and declined to find the bannering unlawful in order to sidestep what it felt was a potential constitutional question. *Id.* at 805-806. The Board majority determined the union's bannering 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). Curiously, the Board majority applied the doctrine of constitutional avoidance on First Amendment grounds and declined to read Section 8(b)(4)(ii)(B) as forbidding the banner displays. *Id.* at 807-811. There was no need for the Board to apply this doctrine because the *DeBartolo II* handbill decision did not compel the conclusion that bannering was protected under the First Amendment.

In fact, the dissenting Board Members Schaumber and Hayes concluded otherwise and 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 n.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” which 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 they 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 by its size, 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.* at 820-21 (citing *Virginia Citizens Consumer Council*, 425 US 748, 763 and fn. 17 (1976)). 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.

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,⁵ 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 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

⁵ 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*.

characteristic of the rat, like picketing, was to “intimidate by conduct, not to persuade by communication.” *Id.*

The dissenters in both *Brandon II* and *Eliason & Knuth* aptly pointed out that the Board majority in both decisions narrowed the long-standing and flexible parameters in determining whether certain conduct constituted picketing or coercion and enabled unions to engage in secondary boycott activities that had for decades been considered unlawful under Section 8(b)(4). Had the Board applied its already well-established broad definition of picketing, the union’s use of the stationary banners in *Eliason & Knuth* and the large inflatable rat in *Brandon II* should have been found tantamount to picketing and unlawful. As such, the Board should overrule *Eliason & Knuth* and *Brandon II* and return to the legal standards previously in effect. While Local 150’s conduct here is unlawful picketing or at least unlawfully coercive under *Eliason & Knuth* and *Brandon II*, a return to the Board’s previous broad and flexible definition of picketing would leave no question as to the lawfulness of Respondent’s conduct.

F. The Judge Erred in Finding that Local 150’s Conduct Was Protected by the First Amendment (Exception 3)

In finding that the stationary banners conveyed substantial information to the public and should be protected under the First Amendment, the ALJ unnecessarily implicated First Amendment concerns because Local 150’s conduct was tantamount to unlawful secondary picketing, and even if not picketing, was labor and commercial speech entitled to less First Amendment protection. It is well-settled that the First Amendment does not shield unlawful secondary picketing conduct. *DeBartolo II*, *supra* at 579-580; *Safeco Title Ins. Co.*, *supra* at 616; *Samuel Langer*, *supra*. Additionally, 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 (10th 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.

Hence, it is clear under *DeBartolo II*, that regulating Respondent’s conduct does not implicate First Amendment concerns or protections. Unlike *DeBartolo* in which the conduct was solely “communication,” the activities here constituted “a mixture of conduct and communication,” and given Local 150’s unlawful object, should receive no First Amendment protection and be found to violate Section 8(b)(4). *DeBartolo II*, *supra*, 485 U.S. at 580.

V. Conclusion and Remedy

For the reasons stated above, Counsel for the General Counsel respectfully requests that the Board 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 banner in two locations from October 4 through October 18, 2018. On October 4th and October 5th, 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 8th and October 18th, 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, 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 Board order Respondent to cease and desist from its unfair labor practices, post an appropriate notice to members, a proposed copy of which is attached as Appendix A, and any other relief the Board deems appropriate.

Respectfully submitted,

Dated: November 13, 2019

/s/ Tiffany J. Limbach

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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, displaying large stationary banners, or by any like or related acts or conduct threaten, restrain, or coerce Maglish Plumbing, Heating, & 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, & 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 Counsel for the General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision has been filed electronically with the Executive Secretary of the Board through the Board's E-Filing System this 13th day of November, 2019. Copies of the filing are being served upon the following persons by electronic mail:

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