

**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 No. 25-CC-230368

Maglish Plumbing, Heating & Electric, LLC

**LOCAL 150's RESPONSE TO GENERAL COUNSEL'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge rightfully and correctly dismissed the Complaint in its entirety.

This is a case about the International Union of Operating Engineers, Local 150, AFL-CIO's ("Local 150") use of an inflatable rat balloon ("Scabby") holding a sign, and a banner on the public right-of-way peacefully to communicate a truthful message to the public about Maglish Plumbing, Heating & Electric, LLC ("Maglish") and its owner. It is undisputed that the messages did not seek anyone to do anything. There is no record evidence in this case that Local 150 did anything but peacefully mind the banner and the rat. There is no record evidence that Local 150 spoke to any third parties about its complained-of protest. There is no evidence that Local 150's conduct was on private property or was confrontational, disruptive, or coercive in any manner. There is no evidence of patrolling. There is nothing in the record other than the protest was peaceful and uneventful. There is likewise no evidence that anyone ceased working, that business was lost, or that anyone refused to enter Maglish's business or jobsite.

The record evidence, then, solely discloses a peaceful First Amendment-protected speech of Maglish, on public property, by Local 150, to anyone who cared to pay attention to it. Local 150's protest occurred after Maglish's unlawful interference with Local 150's picketing of a company called Davis and Son Excavation, LLC ("Davis") (*see* Case No. 25-CA-232405, merit-

finding against and informal settlement entered into by Maglish). Accordingly, the National Labor Relations Board should: 1) deny Counsel for General Counsel's Exceptions; 2) affirm the ALJ's decision; 3) not overturn *Eliason & Knuth*, 355 NLRB 797 (2010); 4) not abrogate Local 150's First Amendment-protected right to free speech; and 5) continue to adhere to the doctrine of constitutional avoidance.

BRIEF STATEMENT OF FACTS

The facts in this case are mostly if not wholly undisputed. As such, at hearing, the Parties stipulated to most facts.

Local 150 admitted and it is not disputed that at all material times, Local 150 has been a labor organization within the meaning of Section 2(5) of the Act.

Local 150 represents heavy equipment operators and other employees in the construction, material production, heavy equipment maintenance and repair, and waste disposal industries throughout northern Illinois and northwest Indiana.

Maglish is located in Portage, Indiana, and performs mechanical contracting work that includes heating, plumbing, and electrical work (ALJD at 2, ¶ 20).

Gary Carroll is part owner of Maglish (Tr. 8, 18; ALJD at 2, ¶ 30).

From at least October 3, 2018, until an unknown date, Gary Carroll, part-owner of Maglish, served as the general contractor for the construction of his personal residence in Valparaiso, Indiana (Tr. 8-9, 18; ALJD at 3, ¶ 5).

Maglish employees worked on the construction of Carroll's house (Tr. 34; ALJD at 3, ¶ 5).

Local 150 admitted and it is not disputed that it has a primary labor dispute with Davis (GC 1). Davis rents equipment to Maglish (Tr. 18).

On October 3, 2018, Davis performed work at the construction of Mr. Carroll's residence (Tr. 19).

Davis also had performed work on the construction of Mr. Carroll's personal residence in August of 2018, and had worked for Maglish prior (Tr. 19, 35).

On October 3, 2018, Local 150 picketed Davis, who was performing work on the construction of the Carroll residence, at the Carroll residence jobsite while Davis was present and working, with signs stating, "Local 150 on Strike Against Davis for Unfair Labor Practices" (Tr. 22, 34).

On October 3, there was no house built, yet (Tr. 34). The Carroll residence was a construction jobsite (*id.*).

Maglish was performing work on the construction of the house (Tr. 34).

Mr. Carroll, who was present at the jobsite on October 3, did not like Local 150's picket of Davis at the jobsite (Tr. 20-21, 35).

Mr. Carroll told Local 150 picketer Jake Wetzal to "get the F _ _ _ off my property." (Tr. 21).

Then, on October 3, 2018, Mr. Carroll instructed an employee to call the Porter County police (Tr. 35-36).

Later, another Local 150 agent showed up who stated to Mr. Carroll that he did not seem so tough now, and how would he like a rat in front of the Maglish shop (Tr. 22).

When the police arrived, Mr. Carroll stated to them that Local 150 was trespassing on his property and blocking traffic with their cars (Tr. 37).

The police, however, did not make Local 150 move its protest of Davis or its cars (Tr. 37).

On October 4, 2018, for the first time, Local 150 established a rat and banner at the Maglish shop (Tr. 38).

Local 150 filed an unfair labor practice charge against Maglish over Maglish calling the police on October 3, 2018 (Tr. 38; GC 1).

Region 25 of the NLRB found merit to the charge, which alleged that Maglish unlawfully interfered with Local 150's picket of Davis on October 3, 2018 (Tr. 38; GC 1).

Maglish settled the charge with an informal Board settlement (Tr. 38; GC 1).

It is undisputed that Local 150's complained-of and the stipulated-to conduct at issue that follows all occurs after October 3, 2018.

On about October 4 and 5, 2018, two Local 150 Business Agents posted a stationary banner approximately three feet tall and eight feet long, which read, "Shame on Maglish for harboring rat contractors," which was located at an intersection at Old Porter Road and Route 20 in Portage, Indiana.

On about October 4 and 5, 2018, two Local 150 Business agents placed an inflatable rat, approximately 12 feet in height, holding a sign reading, "Gary, the lying rat," which was 24 inches by 16 inches, at an intersection located at Old Porter Road and Route 20 in Portage, Indiana.

From about October 8, 2018, and continuing daily through October 18, 2018, two Local 150 Business Agents placed an inflatable rat, approximately 12 feet in height, holding a sign reading, "Gary, the lying rat," near the jobsite along Division Road in Valparaiso, Indiana. The dimensions of that sign were 24 inches by 16 inches.

From about October 8, 2018, and continuing daily through October 18, 2018, two Local 150 Business Agents posted a stationary banner, approximately three feet tall and eight feet long, which read, "Shame on Maglish for harboring rat contractors," near the jobsite located along Division Road in Valparaiso, Indiana.

ARGUMENT

The Board should deny Counsel for General Counsel's Exceptions in their entirety.

In this case, there is no evidence of any unlawful "cease doing business" objective and/or of any unlawful coercion of neutral employers. There is no evidence of any picketing. Likewise, there is no evidence of any coercion or inducement of neutral employees to honor a picket.

Section 8(b)(4) "describes and condemns specific union conduct directed to specific union objectives." *Local 761, International Union of Electrical, Radio and Machine Workers v. NLRB*, 366 U.S. 667, 672 (1961) (emphasis in original). Therefore, to prove a violation of Section 8(b)(4), a plaintiff must establish unlawful conduct and unlawful motive. *UFCW, Local 1776*, 334 NLRB No. 73 at *1 (2001) ("There are essentially two elements necessary to establish a violation of Section 8(b)(4)(i) and (ii)(B)...unlawful conduct and unlawful object"); *Pickens-Bond Constr. Co. v. United Bhd. of Carpenters, Local 690*, 586 F.2d 1234, 1239 (8th Cir. 1978); *Paramount Transport Systems v. Chauffeurs, Teamsters & Helpers, Local 150*, 529 F.2d 1284, 1286 (9th Cir. 1976).

Section 8(b)(4)(i)(ii)(B) of the LMRA states (29 U.S.C. § 158(b)(4)(i)(ii)(B)):

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

In this case, the ALJ rightly dismissed the Complaint in its entirety, finding: no picketing, no coercive non-picketing, no signal picketing—nothing but First Amendment-protected speech.

I. Local 150 Did Not Violate 8(b)(4)(ii)(B).

In this case, the ALJ correctly found no Section 8(b)(4)(ii)(B) violation because there is simply no evidence that Local 150’s banner and use of Scabby was picketing or amounted to unlawful non-picketing coercive conduct.

A. The ALJ Correctly Held that Local 150’s Use of Scabby the Rat and Stationary Banners Was Not Picketing.

Local 150 did not engage in any picketing. The display of large stationary signs, even with the presence of handbillers and an inflatable rat, without more, is not picketing. *See IBEW Local 98, Eliason & Knuth*, 355 NLRB 797 (2010); *Brandon Regional Medical Center*, 356 NLRB 1290 (2011); *Carpenters Local 1827 (United Parcel Service, Inc.)*, 357 NLRB 415, 419 (2011) (“The handbilling alone was undisputedly lawful, and the banner displays alone were lawful under *Eliason* and *Marriott*. Nothing in the record or the law suggests that these two activities in combination were more than the sum of their lawful parts.”); *Overstreet v. Carpenters, Local 1506*, 409 F.3d 1199 (9th Cir. 2005).

In order for bannering and the use of an inflatable rat to be converted to unlawful picketing, the Board requires the element of “confrontation” to be present in the union’s conduct. *Carpenters Local 1827*, 357 NLRB at 417. Absent confrontation, the display amounts to nothing more than protected free speech. As the Board notes in the *Eliason* cases, “[t]he core conduct that renders picketing coercive under Section 8(b)(4)(ii)(B) is not simply the holding of signs..., but the combination of carrying of picket signs and persistent patrolling of the picketers back and forth in front of an entrance to a work site, creating a physical or, at least, a symbolic confrontation between the picketers and those entering the worksite.” *Eliason & Knuth of Denver*, 355 NLRB 799, 802 (2010). The Board further noted that banner displays lack the characteristics of picketing and are not otherwise coercive, particularly when the conduct is absent bullhorn announcements, in close proximity to buildings, blocking of ingress and egress, threats, shouting of names, mass gatherings, or the dumping of garbage. *Id.*; *Sheet Metal Workers Intl. Assn.*, 356 NLRB 1290 (2011). In this case, there is a complete dearth of facts even remotely referencing confrontation.

So, picketing requires confrontational conduct, indeed, as Counsel for General Counsel’s own cases demonstrate. Here, there is no evidence of confrontational conduct. There was no disruption of business, no blocking of any entrances, no patrolling, no violence. The rat and banners did not create any physical barrier to entry. *See IBEW Local 98*, 2019 WL 2296952, JD-45-19 (May 28, 2019). Rather, as the ALJ correctly found, Local 150’s use of its banner and Scabby holding a sign was mere protected speech proclaiming Local 150’s opinion of Maglish to the public at Maglish’s business and at Carroll’s residence where Maglish was working (ALJD at 8, ¶ 35).

B. The ALJ Correctly Found that Local 150 Did Not Engage in any Non-Picketing Coercive Conduct.

Again, as the record overwhelming shows, there is a dearth of evidence of either coercive conduct or an unlawful secondary objective that supports an 8(b)(4) violation.

Section 8(b)(4)(ii)(B) authorizes unions to encourage and/or induce neutral employers to support their objectives, and threats to engage in protected activities are likewise protected. *NLRB v. Servette, Inc.*, 377 U.S. 46, 57 (1964) (“statutory protections...would be undermined if a threat to engage in protected conduct were not itself protected”). Therefore, even if the purpose of the activity is for one employer to cease doing business with another, a union may attempt peacefully “to persuade, induce or encourage it to cease the relationship.” *BE&K v. Carpenters*, 90 F.3d 1318, 1330 (8th Cir. 1996), citing, *Servette*, 377 U.S. at 54. Thus, for such conduct to be unlawful, it must be accompanied by threats of illegal picketing, coercion, or restraint. *BE&K*, 90 F.3d at 1330; 29 U.S.C. § 154(8)(b)(4)(ii)(B).

Furthermore, what constitutes threats or coercion should not be interpreted broadly. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 578 (1988). Indeed, warnings or threats of protected activity “are not prohibited as ‘threats’ within subsection (ii) [of §8(b)(4) of the Act].” *Servette*, 377 U.S. at 57. This is so because federal labor policy encourages “practices fundamental to the friendly adjustment of industrial disputes,” 29 U.S.C. § 151; and declares the policy of the United States to be the right of employees and unions to engage in protected activity. *Id.*; *see also Servette*, 377 U.S. at 57; *Boxhorn’s Big Muskego Gun Club, Inc. v. Electrical Workers Local 494, et al.*, 798 F.2d 1016, 1020 (7th Cir. 1986) (“*Servette*...stressed that Congress had a ‘profound...concern that the unions’ freedom to appeal to the public for support of their cause be adequately safeguarded” (citation omitted)).

Counsel for General Counsel's Exceptions must be denied because first, in this case, there is no evidence of an unlawful 8(b)(4) objective. Local 150's banner with its message of "Shame on Maglish" and its sign on Scabby stating, "Gary the Lying Rat," on their face, do not ask anyone to cease doing business with Maglish. Local 150 at no time acted inconsistent with its message. Indeed, there is no evidence that Local 150 spoke to anyone about anything, let alone even appealed to anyone to cease doing business with Maglish. In fact, there is no evidence that anyone ceased doing business with Maglish because of Local 150's presence at Maglish and Carroll's residence where Maglish was working.

Moreover, even if somehow, Local 150's complained-of conduct was found to have a "cease doing business" objective, there is no accompanying coercive conduct of any kind. Local 150's protest amounted to no more than lawful peaceful persuasion. Local 150 representatives merely monitored Scabby and the banners. They did not patrol. They did not speak to anyone. They did not confront anyone. Again, there is no evidence that any business was lost. All the evidence shows is at most, lawful, peaceful persuasion through speech which is not an 8(b)(4) violation.

Additionally, the use of Scabby the inflatable rat does not show an unlawful objective. As the ALJ rightfully found, displaying an inflatable rat as part of a protest to the public, on public property, does not amount to 8(b)(4) coercive conduct. Counsel for General Counsel offered no testimony or other evidence to show that Scabby (or the banner) was present to coerce Maglish or any other employer to cease doing business with anyone.

There is no evidence of any patrolling, name-calling, bullhorns, mass picketing, the blocking of entrances, or violence. No such evidence exists. The facts here show no disruption at all.

Since Counsel for General Counsel could not provide any evidence of coercion or an unlawful objective, Counsel for General Counsel instead relies solely on the size, look, and placement of Scabby to argue that coercion exists. Local 150's decision to place Scabby on the public right-of-way near the entrance to Maglish's business and the construction of Maglish's owner's residence of which he was the general contractor and employed Maglish to perform work does not amount to coercion of any neutral employer(s). Local 150 chose a location to communicate its message to a public that might be interested in knowing that Maglish had a business relationship with Davis and Son, a non-union company, and that Carroll had lied to the police about Local 150. The location may have proven to be embarrassing to Maglish, but not coercive. There is no evidence that any third party employers or employees were impeded in any way or refused to work because of the location or appearance of Scabby.

As to Scabby's size and appearance. It is important to note that Scabby is but a mere balloon, albeit a balloon protected by the First Amendment. *Construction and General Laborers Local 330 v. Town of Grand Chute Wisconsin*, 834 F.3d 745, 751 (7th Cir. 2016); *Int. Union of Operating Engineers v. Village of Orland Park, Local 150*, 139 F. Supp. 2d 950, 958 (N.D. Ill. 2001). Scabby's presence solely serves to direct attention to Local 150's message. It is impossible that an inanimate inflatable on public property could coerce in the accepted 8(b)(4) sense of violence, mass picketing, confrontation, patrolling, and blocking of entrances—all of which are non-existent in this case.

II. The ALJ Rightfully Found that Local 150's Use of the Banners and the Inflatable Rat Was Not Signal Picketing.

The ALJ correctly held that Local 150 did not violate Section 8(b)(4)(i)(B). Section 8(b)(4)(i)(B) proscribes the inducement of neutral employees to honor a picket and cease working for their employer. 29 U.S.C. § 158(b). Bannering with a message to the public and the use of an

inflatable rat, as argued above, without more, are not picketing. Furthermore, the record is devoid of any evidence that Local 150 engaged in any conduct to induce neutral employees to cease working. There is no evidence that any employees withheld their services in any capacity. Counsel for General Counsel therefore argues that Scabby's mere presence amounted to an inducement of neutral employees as a signal picket. However, the ALJ rightfully found otherwise.

The ALJ was right to conclude that Local 150's banners and rat were simply messaging aimed at educating the public about Maglish (ALJD at 8, ¶ 35). *Carpenters Southwest Regional Council Locals 184 & 1498*, 356 NLRB 613 (2011). The rat and banners were not tantamount to a prearranged signal to anyone to cease working. Indeed, as stated before, there is no record evidence that anyone understood the rat and banners to be a signal to cease working and no evidence that anyone did in fact cease working.

According to current Board law, "signal" picketing is unlawful where it is simply a disguised form of picketing which is otherwise unlawful. *Eliason & Knuth*, 355 NLRB 797, 805 (2010) ("signal picketing is activity short of picketing through which a union intentionally, implicitly, directs members not to work at targeted premises." (emphasis added)). Hence, when a property-owner or other employer properly establishes a reserved gate in order to "cabin" the labor dispute with a primary employer, union pickets must confine themselves to that gate reserved for the prime. *See, e.g., Mautz & Oren v. Teamsters*, 582 F.2d 1117, 1122 n.3 (7th Cir. 1989). Should the union post observers at the gate designated for neutral employers and their employees, and the Board deems those observers to be a "signal" to neutral employers and employees that the union has a primary dispute with an employer the employees of which are working at a common situs, the Board has found that such a signal may itself be unlawful. *See, e.g., Operating Engineers Local 12 (Hensel Phelps Construction)*, 284 NLRB 246 (1987) (stationing groups of business

agents at neutral gate seen conversing with other trades without explanation for content of conversation constitutes “signal” picket).

In this case, there was no picket line or reserved gate. It would be illogical then to conclude that Scabby and the banners, under Board law, amounted to a signal picket. Moreover, the concept of holding unlawful the “signaling” of a labor dispute through non-picketing activity is unconstitutional. The Board’s reasoning plainly depends upon seeking a desired outcome (honoring a picket line) by conveying an idea (observers, banners, rats) which connotes a labor dispute. But the First Amendment is clear: “Congress shall make no law...abridging the freedom of speech...” U.S. Const. Amend. I. The presence of a rat—a symbolic expression of disapproval and/or the presence of a banner projecting “Shame On” purported neutrals for using non-union contractors—is an opinion as well as a viewpoint (non-union bad) and is an expression of an idea a third-party observer may accept, reject, or simply ignore. But that response is based upon the content of the message expressed and most importantly implied. Discrimination against such expression—in the form of regulation that authorizes the government to prohibit it pursuant to Section 10(1) of the Act, and/or punish it through damage suits brought by “any person,” *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964); 29 U.S.C. § 187 (“Whoever shall be injured in its business or property [by a violation of 8(b)(4)]...and shall recover the damages by him sustained”)—is both viewpoint and content-based, and therefore unconstitutional.

III. The ALJ Correctly Held that Local 150’s Use of the Banners and the Inflatable Rat Was Protected by the First Amendment.

The Board should find that Local 150’s complained-of conduct is protected free speech. “Congress shall make no law...abridging the freedom of speech...” U.S. Cons. Amend. 1. As the Seventh Circuit Court of Appeals recently observed, “there is no doubt that a union’s use of Scabby [the inflatable rat] to protest employer practices is a form of expression protected by the First

Amendment.” *Construction and General Laborers’ Union No. 330 v. Town of Grand Chute*, 915 F. 3d 1120, 1123 (7th Cir. 2019); *see also Sheet Metal Workers Int. Assn. Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007) (“mock funeral” procession accompanied by a 16-foot tall inflated balloon rat and handbilling outside a hospital “was a combination of street theater and handbilling” and was not “functional equivalent” of picketing and therefore outside the scope of Section 8(b)(4)); *Tucker v. City of Fairfield*, 398 F.3d 456, 462 (6th Cir. 2005) (“In our view, there is no question that the use of a rat balloon to publicize a labor protest is constitutionally protected expression within the parameters of the First Amendment, especially given the symbol’s close nexus to the Union’s message.”).

As the court explained in *Int. Union of Operating Engineers v. Village of Orland Park, Local 150*, 139 F. Supp. 2d 950, 958 (N.D. Ill. 2001):

The rat has long been a symbol of labor unrest. *See* The New Shorter Oxford English Dictionary 2480 (4th ed. 1993) (defining “rat” as, *inter alia*, “[a] worker who refuses to join a strike or who takes a striker’s place”). We easily conclude that a large inflatable rat is protected, symbolic speech. Therefore, we find that Local 150’s use of an inflatable rat to publicize its protest with Crystal Tree falls within the category of protected speech.

As the caselaw amply demonstrates, the courts have held that the symbol of a rat has been used continuously in the context of labor disputes for almost 200 years. Indeed, this fact has been recognized as well in other court and Board decisions. *See, e.g., Geske & Sons, et al.*, 317 NLRB 28, 42 (1995), *aff’d*, 103 F.3d 1379 (7th Cir. 1997); *Kmart Corp.*, 322 NLRB 1014 (1997); *International Paper Company, et al.*, 319 NLRB 1253, 1295 (1995); *Brown and Root USA, Inc., et al.*, 319 NLRB 1009, 1083 (1995); *San Francisco Building Trades Council*, 29 NLRB 1050, 1054 (1990). Therefore, an inflatable rat that is set up on public property is constitutionally protected. *See Tucker and Orland*. This is so because “in places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the states to limit

expressive activity are sharply circumscribed.” *Hague v. CIO*, 307 U.S. 496, 515 (1939). “Streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.” *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976).

Here, Local 150’s use of its 12-foot inflatable rat and banners to publicize its message is protected free speech. The Board has rightfully determined that the display of a stationary sign, along with a 16 ft. x 12 ft. inflatable rat, is considered non-coercive lawful bannering and protected by the First Amendment. *See Sheet Metal Workers Intl. Assn.*, 356 NLRB 1290 (2011) (the display of a banner with 16 ft. x 12 ft. inflatable rat is non-coercive conduct and protected by the First Amendment; particularly when the conduct is absent bullhorn announcements, close proximity to buildings, blocking of ingress and egress, threats, shouting of names, mass gatherings, or the dumping of garbage); *see also Microtech Contracting Corp. v. Mason Tenders Dist. Council of Greater New York*, 55 F. Supp. 3d 381, 389 (E.D. N.Y. 2014); *W2005 Wyn Hotels v. Asbestos, Lead & Hazardous Waste Laborers' Local 78*, No. 11 Civ. 1249, 2012 WL 955504, at *3, 2012 U.S. Dist. LEXIS 39318, at *8-9 (S.D.N.Y. Mar. 8, 2012); *Betal Environmental Corp. v. Local Union 78*, 162 F.Supp.2d 246, 256-57 (S.D. N.Y. 2001).

The fact that the rat enjoys First Amendment free speech protection flows from the well-settled principle that “at the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.” *Boze Corp. v. Consumer Union of the U.S., Inc.*, 466 U.S. 485, 508 (1984). Political speech is most worthy of protection and comprises the core of First Amendment concerns. *Buckley v. Valeo*, 424 U.S. 1 (1976). Moreover, that the speech in question may be satirical, or not speech, *per se*, at all, but even caricatures, drawings, and the like do not lessen the protection to which they are entitled under the First Amendment. This is particularly true where the expressive activity takes place in

a public place. “The outdoor sign or symbol is a venerable medium for expressing political, social, and commercial ideas. From the poster to the ‘broad side’ or billboard, outdoor signs have played a prominent role throughout American history rallying support for political and social causes.” *Metro Media, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981). The use of stationary banners has received similar protection. *See, e.g., Overstreet v. United Brotherhood of Carpenters and Joiners*, 409 F.3d 1199, 1212 (9th Cir. 2005) (denying injunctive relief under § 10(l) where application of § 8(b)(4) to banners reading “Shame on [name of retailer]” would pose a “significant risk of infringing on First Amendment rights”).

Counsel for General Counsel argues that Local 150’s use of Scabby and banners is not protected because it is commercial speech. Speech concerning a labor dispute, however, is public speech and afforded the highest safeguards afforded by the First Amendment to the Constitution. *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940). Speech is considered public speech when it deals with matters that “can fairly be considered as relating to any political, social, or other concerns of the community.” *Snyder v. Phelps*, 562 U.S. 443, 453 (2011). Local 150’s message to the public can fairly be considered as relating to the concerns of the community. Maglish does business with a rat non-union contractor. Its owner lied to the police. These are concerns of the community that some in the community likely would like to know. The location of where Local 150 communicated its message does not render its speech unprotected. Local 150 simply chose locations where the public may be interested in learning about Maglish. This is no different than say PETA displaying its message about a farm that mistreats animals at a local supermarket that sells the farm’s product. PETA’s speech would not be considered commercial simply because it was being made in front of the supermarket.

IV. The Doctrine of Constitutional Avoidance Dictates that the Board Not Overturn *Eliason & Knuth* Because Doing So Would Require Finding that Local 150's Use of Scabby and Banners in this Case Was Unconstitutional.

The Board should not overturn *Eliason & Knuth* and should follow the doctrine of constitutional avoidance. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Court held that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Id.* at 575. As the Court explained (*id.*):

This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

As argued above, the use of rats and banners to publicize labor disputes is protected by the First Amendment. *Construction and General Laborers Local 330 v. Town of Grand Chute Wisconsin*, 834 F.3d 745, 751 (7th Cir. 2016); *Overstreet v. United Brotherhood of Carpenters and Joiners*, 409 F.3d 1199 (9th Cir. 2005); *Sheet Metal Workers Int. Assn. Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007); *Tucker v. City of Fairfield*, 398 F.3d 456, 462 (6th Cir. 2005); *Int. Union of Operating Engineers v. Village of Orland Park, Local 150*, 139 F. Supp. 2d 950, 958 (N.D. Ill. 2001). In *Construction and General Laborers' Union No. 330 v. Town of Grand Chute*, 915 F. 3d 1120, 1123 (7th Cir. 2019), the Court recently emphasized:

As we acknowledged in our earlier opinion, there is no doubt that a union's use of Scabby to protest employer practices is a form of expression protected by the First Amendment. *Scabby I*, 834 F.3d at 751. Rats, as the manufacturer attests, “Get Attention.”

Therefore, under the Supreme Court's doctrine of constitutional avoidance, the National Labor Relations Board (NLRB) must adopt an interpretation of the NLRA which construes the statute so

as to avoid the First Amendment issue. *DeBartolo*, 485 U.S. at 575. The NLRB has already done so with respect to rats and banners, finding their use not coercive or the equivalent of picketing. *See, e.g., Laborers Local 872 (NAV-LVH, LLC)*, 363 NLRB No. 168 (2016) (“stationary union inflatables” “at a secondary/neutral employer’s premises notifying the public of a labor dispute does not constitute picketing or disruptive or otherwise coercive non-picketing conduct violative of Section 8(b)(4)(ii)(B) of the Act.”); *Carpenters Local 1827 (United Parcel Service)*, 357 NLRB 415, 416 (2011) (banners protected by First Amendment require Board to avoid construing the Act to find Section 8(b)(4) violation lest it raise serious constitutional question); *United Brotherhood of Carpenters (Eliason & Knuth)*, 355 NLRB 797 (2010). Recent cases decided subsequently confirm this law. *See, e.g., King v. Construction & General Laborers’ Local 79*, 2019 WL 2743839 (E.D. N.Y. July 1, 2019) (denying preliminary injunction under Section 10(l)); *Ritz Hotels Services LLC v. Brotherhood of Amalgamated Trades Local 514*, 2019 WL 2635971 (S.Ct. N.J. June 27, 2019) (dismissing tort claims as preempted by NLRA); *International Brotherhood of Electrical Workers Local 96 (Fairfield Inn)*, NLRB Case No. 04-CC-223346, JD-45-19 (May 26, 2019).

Given that it is well settled that the use of rats and banners to publicize labor disputes is protected by the First Amendment, this obvious constitutional problem which the Supreme Court avoided in *DeBartolo* cannot be avoided here. Should the Board seek to revisit this issue now, in light of the Supreme Court’s recent jurisprudence, its position would be untenable. *See, e.g., National Institute of Family and Life Advocates v. Bicerra*, 585 U.S. ___, 138 S.Ct. 2361 (2018) (state-mandated notice of alternatives to customers of anti-abortion clinics is content-based regulation of speech in violation of First Amendment); *Reed v. Town of Gilbert*, 576 U.S. ___, 135 S.Ct. 2218 (2015) (local sign ordinance limiting advertising unconstitutional content-based regulation of speech); *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (Westboro Baptist Church members

picketing funeral of soldier killed in Iraq protected speech under First Amendment); *see generally* Catherine Fisk and Jessica Rutter, “Labor Protest Under the New First Amendment,” 36 Berkeley Journal of Employment and Labor Law 277, 300-315 (No. 2, 2015) (“The Labor Picketing Cases Are Inconsistent with the Court’s First Amendment Jurisprudence”); *see also Janus v. AFSCME Council 31*, 585 U.S. ___, 138 S.Ct. 2448 (2018) (government interest in “industrial peace” insufficient to overcome employee First Amendment rights).

CONCLUSION

For all the foregoing reasons, Local 150 respectfully requests the Board to deny General Counsel’s Exceptions in their entirety and not overturn *Eliason & Knuth*.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that he electronically filed the foregoing with the National Labor Relations Board. The undersigned further certifies that he served a copy of the foregoing via electronic mail on the following:

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