

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

INTERNATIONAL UNION OF OPERATING)	
ENGINEERS, LOCAL 150, AFL-CIO,)	
)	
)	Cases 13-CP-227526
And)	13-CC-227527
)	13-CC-231597
)	13-CC-233109
DONEGAL SERVICES, LLC,)	
)	Oral Argument Requested
And)	
)	
ROSS BUILDERS, INC.)	

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

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Respondent International Union of Operating Engineers, Local 150, AFL-CIO (“Local150” or the “Union”), respectfully submits its response in opposition to General Counsel’s exceptions to Administrative Law Judge Kimberly R. Sorg-Graves’ decision (“ALJD”) in this matter issued on December 13, 2019.

I. ARGUMENT

A. **The Peaceful Use of Rat and Banner Displays Urging a Consumer Boycott Are Protected by the First Amendment and Not Subject to Regulation Under Section 8(b)(4).**

Counsel for the General Counsel’s first exception to the ALJ’s decision states (at 5) (footnotes omitted):

The portion of the ALJ’s decision in which the ALJ failed to find the rats/banners were tantamount to unlawful secondary picketing and signal picketing that unlawfully induced or encouraged neutral employees to cease working, or at least constituted unlawfully coercive non-picketing conduct. (ALJD Pg. 30 (lines 21-16) through pg. 34 (lines 1-10)) *Carpenters Local 1506 (Eliason & Knuth of Arizona)* [355 NLRB 797 (2010)], *Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)* [356 NLRB 1290 (2011)], and *Carpenters Southwest Regional Councils Locals 184 & 1498 (New Star)* [356 NLRB 613 (2011)] were wrongly decided and the Board should overturn those cases.

In support of this exception, counsel for the General Counsel argues that in its treatment of inflatable rats and stationary banners, the Board has abandoned its previously “broad and flexible definition” of picketing (Counsel for the General Counsel’s Exceptions and Brief in Support Thereof to the Decision and Recommended Order of the Administrative Law Judge (hereafter “CGC Brief”) at 23). Instead, counsel for the General Counsel argues that inflatable rat and stationary banner displays are “tantamount” to coercive, secondary picketing (CGC Brief at 8), or

alternatively, conduct which falls short of traditional picketing¹ which sends a “signal” to neutral employees they should withhold their services (CGC Brief at 9). According to counsel for the General Counsel (CGC Brief at 23-29) (footnotes omitted):

Applying the more reasonable definition of picketing that was in effect before *Eliason & Knuth* and *Brandon II*, Respondent’s conduct here violated the Act. Local 150 posted agents holding a big banner, and a large, intimidating inflatable rat, at the entrances to the eight neutral employer sites, with the undisputed aim of forcing those businesses to cease using Donegal Services, with whom Local 150 had a primary dispute. Local 150 agents’ holding of a large, misleading banner—the functional equivalent of a picket sign—and the posting of a large, hostile-looking rat at the entrance to the site, were each tantamount to picketing because each created a symbolic, confrontational barrier to anyone seeking to enter or work at the sites.²

The ALJ found in part³ (ALJD at p. 30: lines 21-38; p. 31: lines 1-2):

Upon review of the factors considered by the Board’s holdings in *Eliason*, and *Brandon II*, I find that these displays [by Local 150] were not tantamount to picketing or otherwise coercive conduct in violation of Section 8(b)(4)(ii)(B) of the Act.

Similar to the Board’s findings in *Eliason* and *Brandon II*, I find that the banners, mobile billboard, inflatable rats, and yard signs expressed messages that constitute speech. The banners informed the readers of Local 150’s opinion that the employer named on the banner contracted with a “rat,” which in this context is an employer with which a union has a labor dispute. The inflatable rat draws attention to the banner, and it emphasizes Respondent’s message that the contracted employer is a rat, and by extension, so is the secondary employer for harboring the primary employer. The yard sign provided social media access information so that interested parties could learn more about Respondent’s activities. Respondent posted these displays in the public right-of-way facing the street where all who passed could read the banners. I find that Respondent’s banners conveyed a less ambiguous message with regards to its dispute with the secondary employer than

¹ The ALJ noted that “the term picketing throughout this decision is, unless otherwise noted, used to refer to conduct in which agents of the Respondent displayed and/or moved about carrying traditional picket signs (i.e., placards affixed to a wooden stick)” (ALJD at 6, n.7).

² The ALJ found Local 150 and Donegal Services, LLC, and SJZJ, LLC, to be parties to a primary labor dispute (ALJD at 2). The ALJ also found E.F. Heil, LLC, d/b/a WillCo Green had a separate primary labor dispute with Local 150 (ALJD at 2), to which counsel for the General Counsel does not except (CGC Brief at 7, n.8).

³ Counsel for the General Counsel relies on several pages of the ALJD in his Exception 1. The portion quoted here is a representative sample.

the banners in *Eliason*, which required an inference to decipher why the union was requesting that the secondary employer be boycotted. *Supra* at 798. While Respondent's message was briefer and lacked the specifics of most handbills, Respondent's displays clearly convey a message like the Board found in *Eliason* and *Brandon II*. Here, neither the language of the banner nor the entire display specifically asked those who viewed it to take any action. Customers, suppliers, and employees were left to their own decisions on how to react to the information.

Counsel for the General Counsel's second exception states (at 5):

The ALJ's failure to find that the rats and banners amounted to unlawful coercion under Section 8(b)(4)(ii)(B) at several locations listed in the complaint, including the offices of Boughton Materials, Elmhurst-Chicago Stone, Greenscape Homes, Provencal Construction, Ross Builders, and at the Andy's Frozen Custard shops. The ALJ wrongly concluded that the rats and banners were lawful in the other locations and instances where they were not accompanied by traditional picketing. (ALJD Pg. 32, lines 35-39, Pg. 34, lines 8-10).

The ALJ found that (ALJD at p. 32: lines 35-39; p. 34: lines 8-10):

Respondent's displays involving banners, inflatable rats, rat patrol vehicles, yard signs, and/or mobile billboards at the offices of Greenscape Homes, Provencal Construction, Ross Builders, and at various Andy's Frozen Custard shops did not violate Section 8(b)(4)(ii)(B) or constitute a continuing violation of Section 8(b)(7)(C).

* * *

I find that Respondent did not violate Section 8(b)(4)(i)(ii)(B) or 8(b)(7)(C) by its banner and inflatable rat displays at the offices of Greenscape Homes, Provencal Construction, Ross Builders, and at Andy's Frozen Custards shops.

The ALJD correctly followed controlling law. Careful review of that law shows the plea to return to some lost "broad and flexible" definition of picketing to be a charade. But, even if the Board overrules *Eliason*, *Brandon II*, and *New Star*, its decision will not survive constitutional scrutiny.

1. Labor disputes and the First Amendment

The First Amendment to the Constitution of the United States provides that, "Congress shall make no law...abridging the freedom of speech..." U.S. Const. amend. 1. Hence, peaceful picketing is a form of speech entitled to constitutional protection. *Thornhill v. Alabama*, 310 U.S.

88 (1940); *Teamsters Local 695 v. Vogt*, 354 U.S. 284 (1957) (peaceful labor picketing protected by First Amendment); *see, generally*, C. Gregory and H. Katz, *Labor and the Law*, 297 (3d ed. W.W. Norton, N.Y. 1979) (“The Supreme Court must be understood to have decided that [peaceful picketing] is speech—a pure matter of communicating ideas or information—and nothing more.”).

As Gregory and Katz explained (*id.* at 299):

Naturally, the Court concedes that some instances of picketing may be prohibited, as when it is accompanied by violence or threats of violence, fraud, libel, et cetera, just as a state may prohibit any “wrongs” committed through the medium of speech. But when truly conventional speech—and this includes platform and soap-box talks, placards and handbills, newspaper and periodical matter, skywriting and radio addresses, and books like this one—is devoted to the frank discussion of anything, regardless of how annoying or even harmful it may be to some people, it cannot constitutionally be suppressed or penalized as such if it does not contain any element which would place it within one of the settled categories of illegality, such as libel or fraud.

The Supreme Court confronted the question whether the secondary boycott prohibitions of Section 8(b)(4) were unconstitutional under the First Amendment in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades*, 485 U.S. 568, 574-575 (1988). In that case, the unions distributed handbills at shopping mall entrances urging customers not to shop at the mall because one tenant paid non-union construction workers substandard wages. *Id.* at 570-571. The unions did not picket or otherwise patrol the mall entrances while handbilling. *Id.* at 571.

Agreeing with the Court of Appeals, the Supreme Court invoked the “constitutional avoidance” rule of statutory construction applied in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). *Catholic Bishop* posits 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. 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. *See Grenada County Supervisors v. Brogden*, 112 U.S. 261, 269, 5 S.Ct. 125, 129, 29 L.Ed. 704 (1884).

The Supreme Court agreed with the Court of Appeals because the NLRB's finding that handbilling alone, peacefully and truthfully advising the public of the existence of a labor dispute, without picketing or patrolling, "poses serious questions of the validity of § 8(b)(4) under the First Amendment." *DeBartolo*, 485 U.S. at 575-576. "On its face this was expressive activity, arguing that substandard wages should be opposed by abstaining from shopping in a mall where such wages were paid." *Id.* at 576. "Had the union simply been leafletting the public generally,...there is little doubt that legislative proscription of such leaflets would pose a substantial issue of validity under the First Amendment." *Id.* Hence, the Court was "quite sure" it "must independently inquire whether there is another interpretation not raising these serious constitutional concerns, that may fairly be ascribed to § 8(b)(4)(ii)(B)." *Id.* at 577.

The Court thus framed the issue as "whether handbilling such as involved here must be held to 'threaten, coerce, or restrain any person' to cease doing business with another, within the meaning of § 8(b)(4)(ii)(B)." *Id.* at 578. The Court held it did not, because "more than mere persuasion is necessary to prove a violation of § 8(b)(4)(ii)(B)." Indeed, under Supreme Court law, it is "untenable" that "any kind of handbilling, picketing, or other appeals to a secondary employer to cease doing business with the employer involved in the labor dispute is coercion" under Section 8(b)(4) because it succeeds in causing them to lose business. *Id.*

Since at least 2005, the federal courts and ultimately the NLRB have applied the principles of *DeBartolo* to distinguish between "picketing" and its confrontational nature and other

expressive conduct like bannering and inflatable rats to avoid the First Amendment problem.⁴ Absent the “confrontational sometimes intimidating conduct associated with traditional picketing,” bannering raises significant constitutional concerns under the First Amendment which courts and agencies are bound to avoid. *Overstreet v. United Brotherhood of Carpenters and Joiners*, 409 F.3d 1199 (9th Cir. 2005), relying on *DeBartolo Corp. v. Florida Gulf Coast Building & Const.* 485 U.S. 568 (1988).

In *Sheet Metal Workers’ Int. Ass’n. Local 15 v. NLRB*, 491 F.3d 429, 437-438 (D.C. Cir. 2007), the Court went a step further and found that a “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 the “functional equivalent” of picketing and therefore outside the scope of Section 8(b)(4). It had none of the “coercive” characteristics of picketing, did not physically or verbally confront hospital patrons, nor patrol the area “in the sense of creating a symbolic barrier” to those who would enter the hospital. *Id.* at 438. Nor was it “signal picketing” with an “implicit instruction” to union members. *Id.* The Court found the union’s conduct “fully consistent” with those, the Supreme Court’s “abortion cases.” *Madsen v. Women’s Health Center Inc.*, 512 U.S. 753 (1994), and *Hill v. Colorado*, 530 U.S. 703 (2000). The union’s videotape “shows the mock funeral was a quiet affair, not at all like the charged atmosphere surrounding the abortion protests in *Madsen*.”

⁴ In several cases, the Board dabbled with theories that various forms of expressive conduct amounted to the “functional equivalent” of picketing, but abandoned that approach after the federal courts rejected it. *See, e.g., Overstreet v. United Brotherhood of Carpenters and Joiners*, 2003 U.S. Dist. LEXIS 19854 (S.D. Cal. 2003), *aff’d.*, 409 F.3d 1199 (9th Cir. 2005); *Benson v. Carpenters Local 184*, 337 F.Supp.2d 1275 (D. Utah 2004) (denying injunction against display of banners and peaceful distribution of leaflets); *Kohn v. Southwest Regional Council of Carpenters*, 289 F.Supp.2d 1155 (C.D. Cal. 2003) (denying injunction against display of banners at jobsite as unlikely to succeed on the merits).

The NLRB itself finally adhered to the *DeBartolo* principles in finding stationary banners outside the scope of Section 8(b)(4) (ii)(B) in *United Brotherhood of Carpenters and Joiners (Eliason & Knuth)*, 355 NLRB 797 (2010). The Board found that the display of stationary banners did not violate the NLRA prohibitions making it an unfair labor practice “to threaten, coerce, or restrain” persons under Section 8(b)(4). Display of stationary banners constituted neither picketing nor otherwise coercive non-picketing conduct. Relying on the constitutional avoidance doctrine applied in *DeBartolo*, the Board majority made clear that to rule otherwise would create a conflict with the First Amendment. Relying on *Eliason*, the Board extended the protection afforded banners to inflatable rats in *Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)*, 356 NLRB 1290 (2011). In *Carpenters Southwest Regional Council (New Star)*, 356 NLRB 613 (2011), the Board held that rats and banners did not amount to signal picketing.

2. There is “no doubt” inflatable rats and stationary banners are protected by the First Amendment.

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) (*Scabby I*); *Overstreet*, 409 F.3d at 1212; *Sheet Metal Workers Int. Assn. Local 15*, 491 F.3d at 439; *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) (*Scabby II*), 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.”

Under the Supreme Court’s doctrine of constitutional avoidance, the 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 Board's decisions in *Eliason*, *Brandon II*, and *New Star* are faithful to this doctrine and therefore were correctly decided. *United Brotherhood of Carpenters (Eliason & Knuth)*, 355 NLRB 797 (2010). The Board has 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). 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(1)); *Ritz Hotels Services LLC v. Brotherhood of Amalgamated Trades Local 514*, 2019 WL 2635971 (D.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); *International Union of Operating Engineers Local 150 (Lippert Components)*, NLRB Case No. 25-CC-228342, JD-57-19 (July 15, 2019).

Given that it is well settled that the use of rats and banners to publicize labor disputes are 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).

3. The ALJ correctly found that rat and banner displays are not tantamount to picketing or otherwise coercive.

Counsel for the General Counsel argues that “the Board and Courts have historically defined picketing in a very broad and flexible manner” (CGC Brief at 10). He adds (*id.* at 10-11) (footnotes omitted):

Patrolling and the carrying of picket signs have never been prerequisites to establish 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 then watching the signs from a parked car; posting stationary agents with signs near an employer’s entrance; disorderly conduct in front of a neutral’s business, including attaching a banner to the neutral’s building; 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.

Other conduct that the Board has found was not picketing but nevertheless coercive within the meaning of Section 8(b)(4)(ii)(B) includes broadcasting a message at extremely high volume through loudspeakers facing a neutral condominium building; throwing bags full of trash into a building’s lobby; and 20-70 union members marching in an elliptical pattern without signs while some distributed handbills. In the latter case, the Board noted that the union’s conduct had “overstepped the bounds of propriety and went beyond persuasion so that it became coercive to a very substantial degree.

None of this conduct occurred in this case.

Counsel for the General Counsel’s argument that the peaceful display of rats and banners at neutral locations unaccompanied by traditional picketing “amounted to unlawful coercion under” Section 8(b)(4)(ii)(B) is constitutionally untenable for the reasons stated, *supra*. Such displays are not otherwise coercive under Section 8(b)(4), moreover, because they lack the confrontational elements required to be considered coercive.

The NLRA makes it unlawful to “threaten, coerce or restrain” employers where the object is to force them to cease doing business with another employer. 29 U.S.C. § 158(b)(ii)(B). In finding peaceful handbilling qualitatively different from picketing, the Supreme Court in *DeBartolo* said, it takes “more than persuasion” to establish “threats, coercion or restraints.” *DeBartolo*, 485 U.S. at 588. It is the “mixture of conduct and communication” that allows the NLRB to regulate picketing—the conduct being confrontation. *Id.* at 580, quoting *NLRB v. Retail Stores Emps. Local 1001 (Safeco)*, 447 U.S. 607, 617 (Stevens, J., concurring); *see also Hughes v. Super. Ct. of Cal.*, 339 U.S. 460, 464-465 (1950) (“industrial picketing is more than free speech since it involves a patrol of a particular locality and since the very presence of the picket line may induce action of one kind or another, quite irrespective of the ideas which are being disseminated.”); *520 South Michigan Avenue Ass’n Ltd. v. UNITE HERE :Local 1*, 760 F.3d 708, 720 (7th Cir. 2014) (“courts have noted the defining characteristic of picketing is that it creates a physical barrier between a business and potential customers”).

The matrix of factors identified by Congress, the federal courts, and NLRB factors by which non-picketing conduct can be considered coercive under Section 8(b)(4) confirm the ALJ’s decision here. In *DeBartolo*, the Supreme Court analyzed the “publicity proviso” to Section 8(b)(4)(B). It states that “nothing contained” in Section 8(b)(4) “shall be construed to prohibit

publicity other than picketing for the purpose of truthfully advising the public, including members of a labor organization” that the union has a primary dispute with one employer, whose products are distributed by another employer, “so long as such publicity does not induce” employees to refuse to work at the establishment of their own employer.” Rather than seen as an exception to Section 8(b)(4) prohibitions, the proviso “has a different ring to it.” *Id.* at 660. Hence, it may thus be read, “as not covering non-picketing publicity, including appeals to customers of a retailer as they approach the store, urging a complete boycott of the retailer because he handles products produced by nonunion shops.

The *DeBartolo* court’s review of its prior caselaw confirms this broad understanding of non-picketing publicity. Its decision in *NLRB v. Fruit Packers*, 377 U.S. 58 (1964) (*Tree Fruits*), “makes untenable the notion that *any* kind of handbilling, picketing, or other appeals to a secondary employer to cease doing business with the employer involved in the labor dispute is ‘coercion’ within the meaning of Section 8(b)(4)(ii)(B) if it has some economic impact on the neutral.” *DeBartolo*, 485 U.S. at 579. Hence, the court “held that the impact of the picketing was not coercion within the meaning of Section 8(b)(4) even though, if the appeal succeeded, the retailer would lose revenue.” *Id.* In *Safeco*, however, the court clarified the distinction between picketing and non-picketing publicity. “Picketing is qualitatively different from other modes of communication.” It is “a mixture of conduct and communication.” *Id.* at 580. “Handbills” are “much less effective because they depend entirely on the persuasive force of the idea” (*id.*):

The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do.

While some of the cases cited by counsel for the General Counsel suggest that “picketing does not require the holding of a sign while patrolling,” they generally involve just that: frequent

repeated holding of signs accompanied by patrolling. *Laborers Local 389 (Calcon Constr.)*, 287 NLRB 570, 573 (1987). In *Calcon*, the Board referenced dictionary definitions that indicate patrolling with signs is not essential to picketing,⁵ but then found violations of Section 8(b)(4) where strikers actually patrolled with picket signs. Picketers also displayed signs elsewhere—tied to phone polls, laying on the ground, and resting against cars and structures—but as many as 15 signs were carried by 20 to 25 people. *Id.* at 571. Similarly, in *Lawrence Typographical (Kansas Color Press)*, 169 NLRB 279 (1968), the Board alluded to conduct not involving patrolling with placards as the equivalent of picketing, but only because it followed approximately *five years* of patrolling with signs as well as picket signs resting against cars and attached to a nearby break trailer. *See also Carpenters Local 2797 (Stoltze Land & Lumber Co.)*, 156 NLRB 388 (1965) (union handbilling violated 8(b)(7) where followed 16 months of picketing with signs and patrolling).

The unions in the cases cited by counsel for the General Counsel also usually engaged in other coercive conduct such as “mass picketing” (*Calcon*, 287 NLRB at 571 (20 to 25 persons carrying picket signs); *Mine Workers District 29 (New Beckley Mining)*, 304 NLRB 71, 72 (1991) (crowd of 50 to 160 people gathered in motel parking lot at 4 to 4:30 a.m. was “mass activity” form of picketing); *Service Employees Local 399 (William J. Burns Int. Detective Agency)*, 136 NLRB 431, 437 (1962) (groups of 20 to 70 people marching in elliptical pattern caused patrons to

⁵ The cases relied upon by counsel for the General Counsel also share the common flaw of citing dictionary definitions of “picket” and “picketing” to conclude that by none of them “is the patrolling or carrying of placards a common element.” *See, e.g., Stoltze Land & Lumber*, 156 NLRB at 394; *Calcon*, 287 NLRB at 573; *Kansas Color*, 169 NLRB at 283. More recent definitions are to the contrary at least with respect to patrolling. *See, e.g., Black’s Law Dictionary* (11th ed., 2019), “picket line (1894) A queue of people who stand or march outside a workplace, often chanting and otherwise demonstrating, in an effort to prevent or discourage people from going in or coming out during a strike.”

force their way into exhibition hall); and/or recording license plate numbers of persons crossing picket lines, *Kansas Color Press*, 169 NLRB at 282; *Stoltze Land & Lumber*, 156 NLRB at 394. “Following in the footsteps of the conventional picketing which had preceded it,” the Board said, in *Kansas Color*, “the conduct as a whole, of which handbilling was merely a part, constitutes picketing.” *Id.* at 284.

The cases relied on to support counsel for the General Counsel’s claim that the Board and courts have historically defined picketing in a “broad and flexible manner” (General Counsel’s Brief at 10, n.20) all deal with isolated incidents of arguably non-picketing conduct, or conduct not involving picket signs, in a broader context of actual picketing and other plainly coercive conduct. *See, e.g., Laborers Local 389 (Calcon Constr.)*, 287 NLRB 570, 573 (1987) (violations of Section 8(b)(4) where strikers actually patrolled with as many as 15 picket signs carried by 20 to 25 people; picketers also displayed signs elsewhere—tied to phone polls, laying on the ground, and resting against cars and structures); *Carpenters Local 2797 (Stoltze Land & Lumber Co.)*, 156 NLRB 388 (1965) (union handbilling violated 8(b)(7) where it followed 16 months of picketing with signs and patrolling); *Mine Workers District 29 (New Beckley Mining)*, 304 NLRB 71, 72 (1991) (crowd of 50 to 160 people gathered in motel parking lot at 4 to 4:30 a.m. was “mass activity” form of picketing); *Service Employees Local 399 (William J. Burns Int. Detective Agency)*, 136 NLRB 431, 437 (1962) (groups of 20 to 70 people marching in elliptical pattern caused patrons to force their way into exhibition hall); *Service Emps. Union (Trinity Building Maintenance Co.)*, 312 NLRB 715, 749-750, 752-754 (1993) (In the few instances in which the union did not use “conventional placards” the ALJ found coercive conduct which amounted to picketing where large groups of demonstrators—ranging from 10 to 20 people—marched in a “closed circular formation” in front of building entrances including those reserved for neutral

employers, blowing whistles, shouting into bullhorns, chanting and carrying small red “Justice for Janitors” signs). Nothing remotely close to these activities was involved in Local 150’s protest.

Local 150’s displays of rats and banners had no coercive characteristics generally associated with violations of Section 8(b)(4). At most, two or three Union members—often retirees—stationed themselves on public property near the entrance of the neutral employer’s facility (ALJD at p. 6, n.8; p. 9: lines 31-34: “The record contains no evidence that Respondent trespassed onto private property while displaying banners and inflatable rats” (ALJD at 6, n.8). The monitors had no picket signs displayed and engaged in no patrolling—remained seated in lawn chairs for the most part or in their vehicles in inclement weather (ALJD at p. 9: lines 29-37). In general, the monitors did not converse with passersby (ALJD at p. 9: lines 34-35).

There are no allegations that the Union’s protest was anything but peaceful. There were no picket signs accompanying the rats and banners, and no “patrolling” such as would create a “physical barrier” (ALJD at p. 31: line 41). The individuals tending the rats and banners sat in lawn chairs or their trucks, and generally avoided contact with passersby (ALJD at p. 9, line 33). There is no evidence the monitors engaged either the public or employees of the companies involved (ALJD p. 9: lines 34-36). Apart from one UPS driver, no neutral employees refused to enter the facilities at which rats and banners appeared, and the UPS driver entered after clarification it was not a picket (ALJD at p. 10: lines 28-36; p. 33: lines 26-29).

4. The ALJ correctly found that rat and banner displays did not amount to signal picketing.

Aside from the recent epiphany concerning the purported “use of rats and banners simultaneously with picketing, which links rats and banners to the picketing” as “a signal to employees,” the counsel for the General Counsel argues that “the Board and Courts have also held that union activity at a neutral’s premises that falls short of traditional picketing may still send a

“signal” to neutral employees that they should withhold their services (CGC Brief at 9). Relying on the dissent in *Brandon II*, counsel for the General Counsel states that “Member Hayes also concluded that the union’s use of a rat balloon was a signal to third parties of an invisible picket line they should not cross. As such, the union’s intent in using the rat as a symbol of labor strike 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.” 356 NLRB at 1296.

Counsel for the General Counsel’s argument fails for multiple reasons. First, there is no evidence that anyone, Local 150 members or otherwise, perceived the rat and banner display as a picket line and refused to cross (ALJD at p. 33: lines 19-24).

As the ALJ explained (ALJD at 33):

The record contains no information about whether any of the construction employees of Greenscape Homes, Provencal Construction, and Ross Builders ever frequented these companies’ offices, nor is there any information about other types of employees that work in these offices. Ross testified about his concerns for the display’s effects on other tenants in the building and customers, but never mentioned the presence of any Ross Builders’ employees. I find it a reasonable assumption that Andy’s shops employ service employees and receive periodic deliveries of product and supplies, but the record contains no information about when these employees report to work or when deliveries are made. The record does not contain evidence that Respondent timed the displays in coordination with the times that employees would report to work or make deliveries. In each case, the displays were erected facing public streets and not the entrance to the entities. Furthermore, there is no evidence that Respondent communicated with any employees to establish the displays as a signal to cease work. Thus, I find insufficient evidence that the displays induced or encouraged secondary employees to withhold their labor.

As the court made clear in *Denver Building Trades*, and later emphasized in *DeBartolo*, inducing individuals to strike is an essential element of the 8(b)(4) violation.

In *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 689 (1951), the Supreme Court held that a strike against a neutral general contractor in order to force it to terminate its relationship with the nonunion subcontractor with which the union had a primary

dispute, violated the secondary boycott prohibitions of Section 8(b)(4). The picket sign said, “This Job Unfair to Denver Building and Construction Trades Council.” *Id.* at 679. In rejecting an argument that the sign was protected speech under Section 8(c) of the NLRA, the Supreme Court offered what now appears to be a prophetic statement (*id.* at 688):

Section 8(c) does not apply to a mere signal by a labor organization to its members, or to the members of its affiliates, to engage in an unfair labor practice such as a strike proscribed by § 8(b)(4)(A). That the placard was merely such a signal, tantamount to a direction to strike, was found by the Board, the issues in this case turn upon acts by labor organizations which are tantamount to directions and instructions to their members to engage in strike action.

See also International Brotherhood of Electrical Workers, Local 501 v. NLRB, 341 U.S. 694 (1951) (strike against neutral employer which induced neutral employees to leave job not protected speech).

In *Service Emps. Union (Trinity Building Maintenance Co.)*, 312 NLRB 715 (1993), the ALJ said “signal picketing” “as with actual picketing, concerns conduct operating as a signal to induce action by those to whom the signal is given.” 312 NLRB at 743. At no point in his analysis, however, did the ALJ find conduct to be unlawful signal picketing. In general, the union engaged in “traditional” “conventional” picketing—patrolling with placards—and other coercive conduct including mass picketing and noisy demonstrations against neutral building owners and managers as part of its “Justice for Janitors” campaign. *Trinity Building*, 312 NLRB at 745-749.

In the few instances in which the union did not use “conventional placards” in *Trinity Building*, the ALJ found coercive conduct which amounted to picketing in violation of Section 8(b)(4). Large groups of demonstrators—ranging from 10 to 20 people—marched in a “closed circular formation” in front of building entrances including those reserved for neutral employers, blowing whistles, shouting into bullhorns, chanting and carrying small red “Justice for Janitors” signs. *Id.* at 750, 753-754. At one point, the demonstrators “rushed” into the lobby chanting and

blowing whistles, and rode elevators up to a neutral employer's office. *Id.* Elsewhere, at least 50 people "surged toward the front door," pinned a neutral employee against one of the glass doors, and another demonstrator "splashed him with red liquid." *Id.* at 753. Taken in context of the tactics employed at other sites involving "traditional" "conventional" picketing, the ALJ concluded that this too "clearly constituted picketing." *Id.* As the ALJ explained (*id.* at 754):

[N]otwithstanding the absence of conventional picket signs, the massed patrolling at front entrances to the various commercial office buildings herein constituted picketing...Furthermore, the trespassory entries [on other occasions] accompanied by the marching and shouting and the massed blocking of ingress and egress...occurring in conjunction with picketing those days, were equally and obviously likewise coercive [in violation of the Act].

The concept of "signal" picketing emerged in NLRB cases challenging the use of union observers at so-called "neutral" entrances in reserved gate cases. *Int. Brotherhood of Electrical Workers, Local 98 (The Telephone Man, Inc.)*, 327 NLRB 593 (1999). The NLRB has found and the federal courts have endorsed the use of "reserved gate" systems at worksites where employers and employees with which unions have primary labor disputes work in close proximity to neutral employers and their employees not parties to those disputes. *See., e.g., Mautz & Oren, Inc. v. Teamsters Local 279*, 882 F.2d 1117 (7th Cir. 1989); *Landgrebe Motor Trans. v. Dist. 72 Machinists*, 763 F.2d 241 (7th Cir. 1985). In an effort to "cabin" the lawful and foreseeable effects of lawful primary picketing on neutrals, property owners and others are permitted to separate the entrances to their facilities and "reserve" an entrance for the primary employer and its employees, while other entrances are reserved for neutrals. *Mautz & Oren*, 882 F.2d at 1122, n.3. Unions must then confine lawful primary pickets of employers at such "common situs" workplaces to the gate used by that employer and its employees. *Id.* at 1122.

One of the many caveats to the NLRB's regulation of common situs picketing is that the gate reserved for the employer and employees with which the union has its labor dispute is that

they use *only* that entrance. *Mautz & Oren*, 882 F.2d at 1122. If primary employers/employees use the entrance reserved for neutrals, that entrance becomes “tainted,” and the union can picket there as well. *Id.* The logical corollary to this caveat then is that unions can station “observers” at the neutral gate to ensure their proper use. The purpose of the observer is to monitor the gate reserved for neutrals to determine whether it has been “tainted” by primary employers and/or their employees, vendors, and suppliers. So long as they only observe, and gather information for the purpose of policing the gate, the presence of observers is lawful.

Once such observers depart from their observer role, and act like picketers, they lose their protection. *See, e.g., Telephone Man*, 327 NLRB at 593, 600. In *Telephone Man*, the Board described the factors which rendered the purported observer a “signal” picket. After the union had notice a reserved gate system had been established, a union representative positioned himself in the middle of the entrance with a sign which said, “observer.” However, from time to time, the sign conveniently flipped over, revealing messages identical to those of the picket signs previously used. Furthermore, the union representative (*id.* at 593):

...was well positioned to talk to employees as they approached to enter the gate, and on at least one occasion, he conversed with [neutral] employees...who then turned away without reporting to work on the project. On yet another occasion,...several pickets walked slowly from the primary gate to the neutral gate, spoke with [the observer] (who was stationed in his usual location there, wearing his observer sign), turned around, and then slowly walked back to the primary gate. In these circumstances, we find that [the observer] was not merely a benign observer but rather was engaged in impermissible signal picketing at the neutral gate.

Petitioner’s argument that the Union’s use of rats and banners amounts to “signal” picketing in violation of Section 8(b)(4) well illustrates the desperate lengths to which he will go to deflate the rat. As was explained *supra*, it is a theory that arises exclusively in the context of reserved gates, where “observers” on neutral gates abandon their observer role and engage in various subterfuges to accomplish what picketers seek to do. Only one of the cases cited by

Petitioner to support his argument—*The Telephone Man*—actually found the union to have engaged in signal picketing. There, the union’s transgression was through to obvious artifice of having a two-sided sign, one side stating “Observer,” while the other was a standard picket sign.

The concept of signal picketing is inapplicable to this case. There were no reserved gates involved, little actual conventional picketing, and more in conjunction with rat and banner displays. There was no other coercive activity as usually accompanies the finding of violations as in *Trinity Building*. There was nothing covert about the inflatable rats and stationary banners—in fact, the opposite in this case. Rats and banners are designed to attract attention, to publicize the Union’s labor dispute in the most dramatic way. *Town of Grand Chute*, 915 F.3d at 1123. It is an appeal to consumers based on an idea—that a given employer is unfair to workers, a threat to community standards, or otherwise unworthy of public patronage. Members of the public can agree, disagree, misunderstand, or ignore those ideas, but they are free speech with an historic, symbolic angle. The peaceful use of rats and banners is outside the scope of Section 8(b)(4).

B. Counsel for the General Counsel Waived Any Arguments Related to Rat and Banner Displays Proximate to Traditional Picketing.

Counsel for the General Counsel’s third exception states (at 5-6):

The ALJ failed to find that by using rats and banners in the presence of traditional picketing in more than one instance and location, Respondent created a link between the confrontational message of the picketing and the rats/banners. The rats and banners served to emphasize and visually amplify the confrontational, threatening conduct of the picketers. (ALJD Pg. 32, lines 9-10; Pg. 34, lines 8-10).

The ALJ found that (ALJD at p. 32: lines 9-10; p. 34: lines 8-10):

Furthermore, I do not find that the picketing conduct at other locations converted these lawful displays into unlawful picketing.

* * *

I find that Respondent did not violate Section 8(b)(4)(i)(ii)(B) or 8(b)(7)(C) by its banner and inflatable rat displays at the offices of Greenscape Homes, Provencal

Construction, Ross Builders, and at Andy's Frozen Custards shops.

Counsel for the General Counsel argues in support of this exception that (CGC Brief at 7)

(footnote omitted):

Specifically, in the instant case, Respondent used the inflatable rats and banners in its campaign against Donegal Services, LLC (Donegal) in a way that amounted to unlawful coercion under Section 8(b)(4)(ii)(B) at multiple locations listed in the complaint...By using the rats and banners in the presence of traditional picketing at multiple locations and instances, Respondent linked the confrontational message of the picketing. Rather than parsing out the use of the rats and banners as lawful at some locations and not at others, the ALJ should have seen that the unlawful picketing tainted the campaign as a whole.

Counsel for the General Counsel's fourth exception states (at 6):

The ALJ failed to find that by using the rats and banners in the presence of traditional picketing, Respondent undermines its argument that the rats and banners are merely a "symbolic expression of disapproval." Rather, Respondent intended to attach the coercive message of the picketing to the display of the rats and banners. (ALJD pg. 31, lines 40-42).

The ALJ found (ALJD at p. 31: lines 40-42):

I find no rationale that supports a conclusion that the banner and inflatable rat displays in this context were more coercive or that they created "a physical, or at least, symbolic confrontation."

Counsel for the General Counsel argues that (CGC Brief at 27) (footnote omitted):

Respondent's use of rats and banners in the presence of traditional picketing undermines its own argument that the rats and banners are merely a "symbolic expression of disapproval." In its post hearing brief, Respondent argues, "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." RPHB Pg. 36. Respondent claims that the response of the observer is based on the message expressed and most importantly implied. However, by engaging in traditional picketing at some locations and not others, Respondent intended to attach the same coercive message of the picketing to the display of the rats and banners. Any reasonable observer of Respondent's campaign, both with and without traditional picketing, would conclude that those doing business with Donegal will be run out of business by Local 150.

Counsel for the General Counsel's fifth exception states (at 6):

Given that the rats and banners were linked to traditional picketing in the Respondent's campaign, the ALJ erred by parsing out as lawful their use in other instances that were part of the same campaign. The ALJ failed to find that the unlawful picketing tainted the Respondent's campaign as a whole. (ALJD Pg. 32, Pg. 9-38).

The ALJ found (ALJD at p. 32: lines 9-38):

I do not find that the picketing conduct at other locations converted these lawful displays into unlawful picketing. As the Board has noted in many contexts, one illegal action does not make another legal action illegal. For example, illegal statements during captive audience speeches do not convert legal statements made during the same speech to illegal statements. See *Orange County Publications*, 334 NLRB 350 (2001). Similarly, lawful handbilling before and after unlawful picketing in the same location is not necessarily converted to unlawful conduct. *CDG, Inc.*, 305 NLRB at 304-305. In *CDG, Inc.*, picketing the secondary was found illegal, but handbilling was not. The Board in *Held Properties I* distinguished the facts of that case from situations where union's nonpicketing conduct was found to be an attempt to usurp the time limits on recognitional picketing provided by Section 8(b)(7) of the Act. For example, handbilling after the 30-day time limit in Section 8(b)(7) where the handbilling is directed at the primary's employees and not the secondary's involvement with the primary has been found illegal. *Held Properties I*, supra at 22. Under such circumstances, the Board has found that the union was continuing its pleas to the primary employers' employees to withhold their labor until the primary recognized the union.

The facts here are distinguishable. Respondent initiated its banner and inflatable rat displays shortly after it started picketing at other locations and well before the 30-day limit on recognitional picketing expired. Therefore, the displays were not simply a veiled attempt to extend the effects of picketing on Donegal beyond the 30-day limit by being initiated only after that date. The fact that Respondent moved its displays to different secondary locations does not require a different result. The message of the banner was not directed at Donegal employees, and the record contains no evidence of Donegal employees being at these locations, aside from one Donegal employee visiting an Andy's shop as a customer. Respondent had other disputes with Donegal including pending unfair labor practices. While I found that Respondent picketed Donegal at other locations with a recognitional or representation object for more than 30 days, I do not find that unlawful conduct precludes Respondent from engaging in other lawful conduct.

Accordingly, I find that Respondent's displays involving banners, inflatable rats, rat patrol vehicles, yard signs, and/or mobile billboards at the offices of Greenscape Homes, Provencal Construction, Ross Builders, and at various Andy's Frozen Custard shops did not violate Section 8(b)(4)(ii)(B) or constitute a continuing

violation of Section 8(b)(7)(C).

Counsel for the General Counsel argued that “given that the rats and banners were linked to traditional picketing in Respondent’s campaign, it was wrong for the ALJ to parse out their use in other instances that were part of the same campaign. The unlawful picketing tainted the Respondent’s campaign as a whole. There was a single threatening confrontation message throughout the campaign” (CGC Brief at 27).

Counsel for the General Counsel’s sixth exception states (at 6):

The ALJ erred in relying on *Southwest Regional Council of Carpenters (Held Properties, Inc.)*, 356 NLRB 21 (2010) which does not support the ALJ’s contrary conclusion. (ALJD Pg. 27, lines 38-39; Pg. 38, line 1-16; Pg. 32, lines 9-23).

The ALJ found (ALJD at 27-28⁶: lines 38-39, 1-16; p. 32: lines 9-23) (footnotes omitted):

The present case involves a factual circumstance not present in *Eliason* or *Brandon I* in that banner and inflatable rat displays often occurred in proximity to ambulatory picketing. While I find no case exactly on point, in *Southwest Regional Council of Carpenters (Held Properties, Inc.)*, 356 NLRB 21, 21 (2010) (*Held Properties I*), the Board considered whether a banner display that was preceded by picketing resulted in a meaningful factual distinction that would require a different result than reached in *Eliason*. In that case, the Union conducted 5 days of lawful area standards picketing before discontinuing the picketing and displaying a banner. *Id.* The picket signs identified only the primary employer, while the banners named only the secondary employer. There was no evidence that employees ceased work. *Id.* In determining that prior picketing does not result in a banner display being automatically viewed as a continuation of that picketing, the Board relied upon its reasoning in handbilling cases. The Board cited precedent including a pre-*DeBartolo* Board decision in holding that under the “publicity” proviso of Section 8(b)94) “prior picketing does not render otherwise lawful distribution of handbills unlawful.” *Id.* “Indeed, handbilling has been found lawful even when it immediately followed *unlawful* secondary picketing.” *Id.* The Board went on to distinguish *Held Properties I* from other cases where nonpicketing conduct, such as handbilling directed at the primary’s employees followed recognitional picketing and was found an unlawful attempt to circumvent the limitation on picketing in Section 8(b)(7) and/or to be a continued signal for the primary employees to honor the picket line. *Supra* at 22.

⁶ Counsel for the General Counsel’s citation to “Pg. 38” appears to be a typo. The continued quote from page 27 appears on page 28.

* * *

The Board in *Held Properties I* distinguished the facts of that case from situations where union's nonpicketing conduct was found to be an attempt to usurp the time limits on recognitional picketing provided by Section 8(b)(7) of the Act. For example, handbilling after the 30-day time limit in Section 8(b)(7) where the handbilling is directed at the primary's employees and not the secondary's involvement with the primary has been found illegal. *Held Properties I*, supra at 22. Under such circumstances, the Board has found that the union was continuing its pleas to the primary employers' employees to withhold their labor until the primary recognized the union.

Counsel for the General Counsel argues that "the use of the banner in *Held* was different from the use of rats and banners in the current case. In *Held*, there was never simultaneous use of the banner with the picketing." (GCG Brief at 28).

Counsel for the General Counsel's seventh exception states (at 6):

The ALJ erred in not finding that the use of traditional picketing alongside the rats/banners tainted the use of the latter across the Respondent's entire campaign. Such a finding is consistent with and analogous to cases in which the Board found that even otherwise lawful, protected handbilling can be unlawful when it is part and parcel of an unlawful picketing campaign. (ALJD Pg. 32, lines 9-10).

The ALJ found (ALJD at 32):

Furthermore, I do not find that the picketing conduct at other locations converted these lawful displays into unlawful picketing. As the Board has noted in many contexts, one illegal action does not make another legal action illegal.

Counsel for the General Counsel argued that "given that the rats and banners were linked to traditional picketing in Respondent's campaign, it was wrong for the ALJ to parse out their use in other instances that were part of the same campaign. The unlawful picketing tainted the Respondent's campaign as a whole. There was a single threatening confrontation message throughout the campaign" (CGC Brief at 27).

Counsel for the General Counsel's eighth exception states (at 6):

The ALJ erred in her interpretation of *Operating Engineers Local No. 139 (Oak*

Construction, Inc.), 226 NLRB 759, 759-60 (1976)) (ALJD Pg. 28, n. 26).

The ALJ found (ALJD at 28, n.26):

See *Laborers Local 332 (CDG, Inc.)*, 305 NLRB 298, 304-305 (1991), (holding that a march and rally constituted unlawful picketing, but that the handbilling before and after the rally was lawful); *Operating Engineers Local 139 (Oak Construction)*, 226 NLRB 759, 759-760 (1976) (pre-*DeBartolo* holding that simultaneous picketing and handbilling were unlawful, but subsequent lawful handbilling that continued after the picketing ceased was lawful under the “publicity” proviso of Sec. 8(b)(4)).

The General Counsel argues only that *Oak Construction* “does not mandate the same result here.” “The size, style and ‘in your face’ aspect of the rats and banners make it easier for them to acquire a coercive demand after being used as part of coercive picketing.”

Counsel for the General Counsel’s ninth exception states (at 6):

The ALJ failed to find that Respondent’s use of rats and banners simultaneously with picketing, which links the rats/banners to the picketing, were a signal to employees and constitute signal picketing under Section 8(b)(4)(i)(B). (ALJD Pg. 33, line 4-5).

The ALJ found (ALJD at 33):

I also find insufficient evidence that Respondent engaged in “signal picketing” in violation of Section 8(b)(4)(i)(B) at these locations.

Counsel for the General Counsel argued that “the use of rats/banners simultaneously with picketing...also serves to bolster the General Counsel’s theory that the rats/banners are a signal to employees and constitute signal picketing” (CGC Brief at 29). “Local 150’s use of rats/banners along with picketing turned them into a signal even if rats/banners wouldn’t otherwise or inherently be considered signal picketing under extant Board law” (*id.*).

Counsel for the General Counsel neither pled nor offered evidence that Local 150’s use of rat and banner displays seeking a consumer boycott of various neutral employers were undertaken in combination with traditional picketing. After the ALJ suggested erroneously that the Union

“picketed in proximity to the banner and inflatable rat displays,”⁷ General Counsel seized on this finding to argue a different case (CGC Brief at 27) (footnote omitted):

Respondent’s use of rats and banners in the presence of traditional picketing undermines its own argument that the rats and banners are merely a “symbolic expression of disapproval.” In its post hearing brief, Respondent argues, “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.” RPHB Pg. 36. Respondent claims that the response of the observer is based on the message expressed and most importantly implied. However, by engaging in traditional picketing at some locations and not others, Respondent intended to attach the same coercive message of the picketing to the display of the rats and banners. Any reasonable observer of Respondent’s campaign, both with and without traditional picketing, would conclude that those doing business with Donegal will be run out of business by Local 150.

Counsel for the General Counsel has waived these arguments. *Bud’s Woodfire Oven LLC d/b/a Ava’s Pizzeria*, 368 NLRB No. 45, slip op. at 1, n.3 (2018) (arguments raised for the first time in exceptions are untimely); *Yorkaire, Inc.*, 257 NLRB 401 (1989) (“A contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived.”); *see also Sheehy Enterprises, Inc. v. NLRB*, 602 F.2d 839, 844 (7th Cir. 2010) (10(b) defense not raised in answer to complaint or at hearing before ALJ deemed waived), relying on *Geske & Sons v. NLRB*, 103 F.3d 1366, 1371, n.8 (7th Cir. 1997). As the Board explained in *Lamar Central Outdoor*, 343 NLRB 261, 265 (2004):

In his exceptions, the General Counsel expands the theory of the violation beyond what was alleged in the complaint and litigated at the hearing.

* * *

The fundamental elements of procedural due process are notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Congress incorporated these notions of due process in the Administrative

⁷ Local 150 has excepted to this finding as unsupported by the record evidence.

Procedure Act. Under the Act, “[p]ersons entitled to notice of an agency hearing shall be timely informed of...the matters of fact and law asserted.” 5 U.S.C. Section 554(b). To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971). Additionally, “an agency may not change theories in midstream without giving respondents reasonable notice of the change.” *Id.* (quoting *Rodale Press v. FTC*, 407 F.2d 1252, 1256 (D.C. Cir. 1968)).

Where the complaint did not allege the theory advanced in the exceptions, and (as in this case)

General Counsel did not seek to amend the complaint, “[i]t is too late for him to do so now.” *Id.*

Nowhere in the complaint was it alleged that Local 150 engaged in traditional picketing in conjunction with its rat and banner displays in violation of Section 8(b)(4). *See, e.g.*, Consolidated Complaint ¶ XII, “by the conduct described in paragraphs VI through X [alleging posting rats and banners at neutral locations] Respondent has been violating Section 8(b)(4)(i)(ii)(B) of the Act;” Paragraph XIII: “By the conduct described in paragraph XI [alleging primary picketing against Donegal] Respondent has been violating Section 8(b)(7)(C) of the Act.” Nor did counsel for the General Counsel argue this theory in his brief.⁸ Instead, the pleadings and argument focus on rats and banners themselves as being the equivalent “tantamount” to picketing or a “signal” to employees to cease doing business.

This omission is likely because the evidence it ever occurred is unsubstantial, such that

⁸ Nor did the Charging Party. While the counsel for the Charging Party made reference to testimony purportedly linking rat and banner displays to traditional picketing, Post-Hearing Brief of Donegal Services, LLC, and Ross Builders, Inc., at 6, he did not argue it as a separate theory of violation, either. The General Counsel’s theory of the case has consistently been that rat and banner displays are the equivalent of picketing in and of themselves—“tantamount” to picketing or a “signal” picket (CGC Brief at 6-7; Tr. 17-19). “The Board has also held that the judge may not find a violation based on an allegation or theory that has been asserted only by the charging party.” NLRB Division of Judges, *Bench Book: An NLRB Trial Manual*, at 18 (Judge Jeffrey D. Wedekind, Ed., January 2020), relying on *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195, slip op. at 1, n.2 (2016) (“It is well settled that a charging party cannot enlarge upon or change the General Counsel’s theory of a case”). Furthermore, “the charging party...has no right to introduce evidence in support of an allegation or theory not asserted by the General Counsel.” *Id.* at 52.

counsel for the General Counsel saw it as unlikely. He conceded in his brief to the ALJ that “Local 150 did not engage in what has been considered traditional picketing during the eight days [the rat and banner displays were present] at Boughton Materials” (CGC Brief at 11). Nevertheless, Judge Sorg-Graves found that (ALJD at 35, lines 20-27):

Here, Respondent repeatedly picketed in proximity to the banner and inflatable rat displays. The general public and Boughton Materials’ employees, and customers, many of which are repeat customers, witnessed Boughton Materials’ name on a banner calling it a rat in the presence of an inflatable rat and periodic picketing. I find that a reasonable person is likely to conflate the picketing and the banner and inflatable rat display as being part and parcel of the same conduct, and therefore, see the banner and inflatable rat display as part of the picketing and a continuation of the picketing conduct even when the picketers were not present.

The General Counsel did not allege such conduct and did not advance this theory in his brief.⁹

Record testimony makes clear that Local 150 did not banner and picket simultaneously at Boughton. Local 150 Business Agent Raymond Sundine testified that at no time was there a picket at Boughton that occurred simultaneously and in proximity to the rat and banner display naming Boughton that was up for a total of a week to 10 days (Tr. 1163). Sundine put Rey Nolazco in charge of the banner display at Boughton (Tr. 1163). Nolazco testified that he oversaw the banner display at Boughton from July 16 through 19, 2018 (Tr. 1033-34). Nolazco bannered at Boughton for two days with fellow Local 150 Business Agent Lance McGill, and the other two days with

⁹ The General Counsel’s theory of the case has consistently been that rat and banner displays are the equivalent of picketing in and of themselves—“tantamount” to picketing or a “signal” picket (Counsel for the General Counsel’s Brief to the Administrative Law Judge at 6-7; Tr. 17-19). “The Board has also held that the judge may not find a violation based on an allegation or theory that has been asserted only by the charging party.” NLRB Division of Judges, *Bench Book: An NLRB Trial Manual*, at 18 (Judge Jeffrey D. Wedekind, Ed., January 2020), relying on *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195, slip op. at 1, n.2 (2016) (“It is well settled that a charging party cannot enlarge upon or change the General Counsel’s theory of a case”). Furthermore, “the charging party...has no right to introduce evidence in support of an allegation or theory not asserted by the General Counsel.” *Id.* at 52. In this case, while the counsel for the Charging Party made reference to testimony purportedly linking rat and banner displays to traditional picketing, Post-Hearing Brief of Donegal Services, LLC, and Ross Builders, Inc., at 6, he did not argue it as a separate theory of violation either.

Tom Rottman (Tr. 1036-37). The banner was removed on July 19, 2018, after Boughton's Vice President, Frank Maly, called Local 150 Business Agent Anthony Deliberto and told him that Boughton was not going to load Donegal trucks (Tr. 802). The Union removed the banner after Maly's phone call because the banner message was no longer true, and the ALJ agreed that the Union was required at that point to remove the banner because the statement on it was no longer true (ALJD at 14, n.14).

There is absolutely no record testimony that any picketing of Donegal occurred at Boughton during the banner display period in July 2018. John Boughton, President of Boughton, testified that Local 150 Business Agent Anthony Deliberto followed a Donegal truck into Boughton's yard on July 11, 2018, and began to establish a picket between the headlights, but John Boughton told Deliberto he could not remain inside the facility and picket, he had to take it outside the front gate, and Deliberto complied with the request (Tr. 800-801). John Boughton then left on vacation for five weeks and never saw either another picket of Donegal or a rat and banner display directed at Boughton (Tr. 31-32). Boughton's Vice President, Frank Maly, testified that he witnessed the Union putting up its rat and banner display stating, "Shame on Boughton Materials for Harboring Rat Contractors," on July 12, 2018, but he never saw a picket against Donegal occur while the rat and banner were displayed through July 19, 2018 (Tr. 74, 76).

Likewise, neither counsel for the General Counsel, nor any Charging Party, introduced any documentary evidence into the record of a Donegal picket occurring simultaneously with a rat and banner display directed at Boughton. Rather, counsel for the General Counsel introduced only two photographs into the record, GC 11 and GC 12, both of which depict a legal, First Amendment-protected rat and banner display notifying the public that Boughton was harboring a rat contractor (*see* GC Exs. 11 and 12). The rat was inflated behind a banner staked into the ground, and two

Local 150 agents were seated in lawn chairs beside the banner (*id.*). There are no picket signs or picketers patrolling depicted in either photograph (*id.*). The absence of such evidence, moreover, warrants an inference adverse to the General Counsel that if such evidence existed, it would not have been favorable. *NLRB v. MFY Industries, Inc.*, 573 F.2d 673, 675 (10th Cir. 1978).

Following Deliberto's July 11, 2018 ambulatory picket of Donegal, it was not until July 20, 2018, after the rat and banner shaming Boughton was removed, that Local 150 agents followed Donegal trucks to Boughton with the intention of picketing Donegal (Tr. 1026). However, as those agents testified, they never got the chance to establish a picket that day because the Donegal trucks turned around and left the Boughton site immediately, driving across the street and into the WillCo Green facility (Tr. 1028). When the Local 150 agents followed the trucks into WillCo, someone at WillCo closed the entrance gate, trapping the Union agents inside WillCo (Tr. 1028. 1032).

Judge Sorg-Graves acknowledged the "odd result" of having two separately legal forms of activity become illegal because they occurred simultaneously at the same location but believed this was the proper result under the circumstances (ALJD at 35, lines 28-30). However, Judge Sorg-Graves has misconstrued the record with respect to this finding. Local 150 did not repeatedly, or in fact, ever, simultaneously display a rat and banner with Boughton's name on it at the same time that it picketed Donegal. The lack of any record evidence to the contrary establishes plain error. Alternatively, the ALJ erred in finding a violation on a theory not advanced by the Counsel for the General Counsel.

C. Absent a Finding of Waiver, the New Arguments Raised by the General Counsel Do Not Support Exceptions to the ALJ's Decision.

1. Even if the ALJ were correct that picketing occurred proximate to rat and banner displays, there is no violation of Section 8(b)(4).

General Counsel's arguments that "picketing alongside the rats and banners tainted the use

of the latter across Respondent’s entire campaign” (CGC Brief at 28) is unsupported by the law or the record. As the ALJ recognized, it is an “odd result that two separately legal forms of activity can become illegal simply because they occur simultaneously at the same location (ALJD at 35). Odd indeed, given the law is otherwise. *See, e.g., Teamsters v. Morton*, 377 U.S. 252, 261-262 (1964) (court without power to award damages proximately caused by lawful, primary activities, even though union may have contemporaneously engaged in unlawful acts elsewhere). And where, as here, there is no evidence that any employer or employee actually linked the purportedly coercive primary picketing with protected speech, it is a result that cannot stand.

2. The ALJ correctly relied upon *Held Properties* to support the conclusion that rats and banners could not be considered unlawful simply because they may have been linked to traditional picketing.

Counsel for the General Counsel quibbles with the ALJ’s reliance on *Held Properties*, saying it was “wrong to parse out as lawful” the use of rats and banners “linked to traditional picketing” in Local 150’s campaign (GC Brief at 27-28). As explained *supra*, any argument dependent upon the purported “linking” of rat and banner displays has been waived. Even if counsel for the General Counsel could support this premise with actual evidence—there are no record references anywhere in Section III of his brief—the ALJ properly applied *Held Properties*.

In that case, the Board framed the question as “whether picketing that preceded the banner display...creates any meaningful factual distinction from *Eliason*.” *Held Properties*, 356 NLRB at 21. In *Eliason*, of course, the Board “concluded that the union’s display of large stationary banners did not violate Section 8(b)(4)(ii)(B) of the Act.” *Held Properties*, 356 NLRB at 21. The union picketed the primary employer, protesting its failure to pay area standard wages outside the entrances to the building containing the offices of the neutral. *Id.* Five days later, the union displayed banners about 50 feet from the building entrances, identifying the neutral employer as

the situs of a “labor dispute.” *Id.* The Board observed that there was no allegation the prior picketing was unlawful and that no employees ceased work. *Id.* The Board found that, “just as prior picketing does not render the peaceful distribution of handbills coercive, it does not render the peaceful display of stationary banners coercive.” *Id.*

The Board in *Held Properties* found no violation of Section 8(b)(4) based upon *Eliason* and “well established Board doctrine.” 356 NLRB at 21. The Board found “most analogous” its decisions in which “otherwise lawful distribution of handbills was preceded by picketing.” *Id.* In such cases decided after *DeBartolo*, it said (*id.*) (emphasis in original):

[T]he Board has uniformly held that prior picketing does not render otherwise lawful distribution of handbills unlawful. Indeed, handbilling has been found lawful even when it immediately followed *unlawful* secondary picketing. We find in this case that, just as prior picketing does not render the peaceful distribution of handbills coercive, it does not render the peaceful display of stationary banners coercive.¹⁰

The Board next addressed cases construing nontraditional picketing activity found to violate the Section 8(b)(7) prohibitions against recognitional picketing distinguished in *Eliason*. In such cases, the unions had engaged in prior recognitional picketing, such that subsequent conduct was construed by the Board as “explicitly or implicitly” found to be a signal to employees

¹⁰ It is significant to note that the Board’s footnote in *Held Properties* addressing the lawfulness of handbilling despite previous unlawful picketing is that which the ALJ relied on in her related discussion in the present case. It stated (*id.* at n.4):

For example, in *Laborers Local 332 (CDG, Inc.)*, 305 NLRB 298 (1991), about 100 union members handbilled for 2 days at the entrances to an office building. A week later, after a brief period of handbilling in the morning, 300 to 400 persons, many carrying signs, held a 30-minute rally in which they marched around the building, blocking all entrances. After the rally, 20 members remained to distribute handbills. The Board found that the march and rally constituted unlawful picketing, but that the handbilling before and after the rally was lawful. *Id.* at 298, 304-305. See also *Operating Engineers Local 139 (Oak Construction)*, 226 NLRB 759, 759-760 (1976) (pre-*DeBartolo* case holding that simultaneous picketing and handbilling were unlawful, but handbilling that continued after the picketing ceased was lawful under the publicity proviso).

to continue to honor prior picketing lines. *Id.* at 22. Because the area standards picketing in *Held* was not recognition, the Board concluded:

[T]he prior picketing in this case does not distinguish the facts here from those in *Eliason*. To rule otherwise, we would have to conclude that the lawful display of the banner somehow became unlawful because it was preceded by picketing which was *not* alleged to be unlawful and could have lawfully continued. We see no basis in law or logic for such an outcome.

The ALJ's reliance on *Held Properties* is fully consistent with Board precedent that supports *Eliason* and the other cases at issue here.

3. The ALJD correctly relied upon the Board's decision in *Oak Construction* to find that prior picketing does not render a subsequent banner display to be a continuation of that picketing.

The ALJ found that in determining in *Held Properties* that "prior picketing does not result in a banner display being automatically viewed as a continuation of that picketing," the Board relied upon its reasoning in handbilling cases (ALJD at 28). In further support, she noted (ALJD at 28, n.26):

See *Laborers Local 332 (CDG, Inc.)*, 305 NLRB 298, 304-305 (1991), (holding that a march and rally constituted unlawful picketing, but that the handbilling before and after the rally was lawful); *Operating Engineers Local 139 (Oak Construction)*, 226 NLRB 759, 759-760 (1976) (pre-*DeBartolo* holding that simultaneous picketing and handbilling were unlawful, but subsequent lawful handbilling that continued after the picketing ceased was lawful under the "publicity" proviso of Sec. 8(b)(4)).

The ALJD's parenthetical to *Oak Construction* states that it is a "pre-*DeBartolo* holding that simultaneous picketing and handbilling were unlawful, but subsequent handbilling that continued after the picketing ceased was lawful under the 'publicity proviso' of Sec. 8(b)(4)." (ALJD at 28, n.26). This is a precise summary of the Board's decision. Rendered in 1976, the ALJ also correctly observed that it predates the Supreme Court's 1988 decision in *DeBartolo*. The Board in *Oak Construction* upheld the ALJ's decision that simultaneous picketing and handbilling

that did not sufficiently identify the primary employer violated Section 8(b)(4)(ii)(B). 226 NLRB at 759. The Board then stated (*id.* at 759-760):

Conversely, we disagree with the Administrative Law Judge’s finding that Respondents’ subsequent handbilling activities, unaccompanied by picketing, were similarly unlawful. The second proviso to Section 8(b)(4) exempts from the reach of that section truthful publicity, other than picketing, which persuades customers of a secondary employer to stop trading with it except to the extent that such publicity has the effect of cutting off his deliveries or inducing his employees to cease work. It is settled law that the protection of this “publicity” proviso extends to service as well as product boycotts. Moreover, the legislative history establishes that the “publicity” proviso was intended to permit a customer boycott of a secondary employer’s entire business and not merely a limited boycott of the product or services involved in the primary dispute.

The Board’s analysis of the handbilling in *Oak Construction* anticipates that of the Supreme Court in *DeBartolo*. It looks to the publicity proviso of Section 8(b)(4) for the statutory basis for its decisions, thus avoiding the constitutional problem. It faithfully looks to the legislative history for Congressional endorsement of consumer boycotts. Far from an “interpretation” of *Oak Construction*, the ALJD accurately described it and properly applied it to the present case.

II. CONCLUSION

For all the above-stated reasons, the National Labor Relations Board should reject the exceptions filed by counsel for the General Counsel and uphold the decision of the Administrative Law Judge.

Dated: February 7, 2020

Respectfully submitted,

INTERNATIONAL UNION OF OPERATING ENGINEERS,
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CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that on February 7, 2020, she electronically filed the attached ***Local 150's Response to General Counsel's Exceptions to the Administrative Law Judge's Decision*** via the National Labor Relations Board website and sent a copy to the following via electronic mail:

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