

**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-228342

Lippert Components, Inc.

**RESPONDENT LOCAL 150's SUPPLEMENTAL BRIEF IN SUPPORT
OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to the “Notice and Invitation to File Briefs” entered October 27, 2020, Respondent International Union of Operating Engineers, Local 150, AFL-CIO (“Local 150” or “the Union”), submits this supplemental brief in support of the July 15, 2019 decision of Administrative Law Judge (“ALJ”) Kimberly Sorg-Graves. 370 NLRB No. 40 slip op. at 1. As the Board stated in the Notice inviting briefs (*id.*):

[the ALJ,] applying *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010), and *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB 1290 (2011), to find that the Union’s stationary display of a 12-foot inflatable rat and two large banners on public property located near the entrance of an RV trade show, a neutral site, did not constitute picketing or otherwise coercive nonpicketing conduct that violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act.

Local 150 will explain below that the ALJ’s decision was correct under current National Labor Relations Board (“NLRB” or “Board) law and should be adopted by the NLRB. To rule otherwise would violate the Union’s rights under the First Amendment to the United States Constitution, and would be contrary to the principle of Constitutional avoidance set forth in *Edward J. DeBartolo v. NLRB*, 485 U.S. 568, 575 (1988), and *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

Statement of the Case

The material facts in this case are undisputed. At all material times, Local 150 has been a labor organization within the meaning of Section 2(5) of the National Labor Relations Act, 29 U.S.C. § 152(5) (“NLRA” or “the Act”) (ALJD 2:20). 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. Local 150 had a primary labor dispute with MacAllister Machinery, Inc. (“MacAllister”) (GC 1). MacAllister rents equipment to Lippert Components, Inc. (“Lippert”) (ALJD 2:25; Tr. 18).

At all material times, Lippert has been an employer engaged in commerce within the meaning of the Act (ALJD 2:10-15; Tr. 9). In conducting its operations during the 12-month period ending October 3, 2018, Lippert purchased and received at its Elkhart, Indiana, facility goods in excess of \$50,000.00 directly from points outside the state of Indiana (*id.*).

From around September 24, 2018, through September 27, 2018, Thor Industries (“Thor”) hosted a trade show in Elkhart, Indiana, for RV manufacturers, suppliers, and dealers (ALJD 2:30; Tr. 18). On September 24, 25, 26, and 27, 2018, Local 150, by unknown agents, posted an inflatable rat, approximately 12 ft. in height, and two banners near the public entrance/exit to Thor’s trade show (ALJD 3:5; Tr. 10; GC 2, 3). One banner approximately 96 in. long and 45 in. high read, “OSHA found safety violations against MacAllister Machinery, Inc.,” near the inflatable rat and the public entrance/exit to Thor Industries’ trade show (ALJD 3:5-15; GC 2, 3). The other banner, approximately the same size read, “Shame on Lippert Components, Inc., for harboring rat contractors,” near the inflatable rat and the public entrance/exit to Thor’s trade show (*id.*).

Mr. Dean Leazenby was the in-house counsel for Lippert (ALJD 3:30-40; Tr. 16). On September 25, 2018, he took a call from Nick Fletcher, Lippert’s Chief Human Resources Officer, who stated that Thor had called and was concerned about the banners and rat being an embarrassment to Thor and Lippert (ALJD 3:30-40; Tr. 20-21). Mr. Fletcher stated nothing about threats, coercion, disruption, or confrontation. Mr. Leazenby, who witnessed Local 150’s protest firsthand, did not testify to any coercion, patrolling, confrontation, or disruption (ALJD 3:35; Tr. 32). Rather, he simply opined the “intentionally” scary rat was there to direct attention to the messages Local 150 was communicating (*id.*). He did not say the rat was coercive (*id.*).

On October 1, 2018, Lippert filed its ULP charge against Local 150 (ALJD 1). Region 25 issued its Complaint against Local 150 on December 31, 2018, and on May 14, 2019, the case was tried before ALJ Sorg-Graves (ALJD 2).

On July 15, 2019, the ALJ issued her decision dismissing the charges (ALJD 57:19; 2019 WL 3073999). The ALJ found that Local 150 “did not violate the Act by placing stationary inflatable rat and banners outside the trade show for four days as alleged in the Complaint.” 2019 WL 3073999 *1. She explained (*id.* at *8):

Respondent’s banners convey information to the public regarding events which have transpired, including the fact that OSHA found safety violations against MacAllister. There is no evidence that this claim is false. The banners here, unlike those in *Eliason & Knuth*, do not instruct the public to stop patronizing a business but rather inform the public of an event which occurred and of a business relationship between employers involved. One of the banners in *Eliason & Knuth* gave specific instructions not to patronize the secondary but was still found to be protected. Therefore, I find that the banners in this case must also be protected under the First Amendment.

On September 12, 2019, the General Counsel and Charging Party Lippert filed exceptions to the decision, to which Local 150 responded on October 1, 2019.

The NLRB’s invitation to file briefs asked the parties and *amici* “to address the following questions.” 370 NLRB No. 40 at 1:

1. Should the Board adhere to, modify, or overrule *Eliason & Knuth* and *Brandon Regional Medical Center*?
2. If you believe the Board should alter its standard for determining what conduct constitutes proscribed picketing under Section 8(b)(4), what should the standard be?
3. If you believe the Board should alter its standard for determining what nonpicketing conduct is otherwise unlawfully coercive under Section 8(b)(4), what should the standard be?
4. Why would finding that the conduct at issue in this case violated the National Labor Relations Act under any proposed standard not result in a violation of the Respondent’s rights under the First Amendment?

Local 150 will address the fourth issue first, because under any standard, regulation of the use of inflatable rats and stationary banners would violate the Union’s rights and those of its members under the First Amendment. Local 150 will then address the first three issues, and explain why the NLRB should adhere to *Eliason & Knuth* and *Brandon Regional Medical Center* as well-reasoned and carefully crafted to avoid the Constitutional issue.

Argument

I. The Peaceful Use of Inflatable Rats and Stationary Banners to Publicize Labor Disputes Is Protected by 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. Peaceful picketing is a form of speech entitled to constitutional protection. *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Am. Fed’n of Labor v. Swing*, 312 U.S. 321 (1941); *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.”).

A. Stationary Banners and Inflatable Rats Are Protected By the First Amendment.

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.” *Constr. and Gen. Laborers’ Union No. 330 v. Town of Grand Chute*, 915 F. 3d 1120, 1123 (7th Cir. 2019) (*Grand Chute II*); *see also Sheet Metal Workers Int’l Ass’n Local 15 v. NLRB*, 491 F.3d 429, 438-439 (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 the “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’l Union of Operating Eng’rs, Local 150 v. Vill. of Orland Park*, 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.

The courts and the Board have recognized that the symbol of a rat has been used continuously in labor disputes for almost 200 years. *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); *Int’l Paper Co., et al.*, 319 NLRB 1253, 1295 (1995); *Brown and Root USA, Inc., et al.*, 319 NLRB 1009, 1083 (1995); *San Francisco Bldg. Trades Council*, 29 NLRB 1050, 1054 (1990).

An inflatable rat that is set up on public property is constitutionally protected. 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). “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).

Local 150’s use of banners to publicize a labor dispute is protected free speech. The Board has determined that the display of a 16 ft. x 12 ft. stationary sign, along with an inflatable rat is considered non-coercive lawful bannering and protected by the First Amendment. *See Sheet Metal Workers Int’l Ass’n*, 356 NLRB 1290 (2011) (the display of a banner with an 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 Carlson v. California*, 310 U.S. 106, 113 (1940) (publicizing the facts of a labor dispute whether by pamphlets, word of mouth, or by banner within liberty of communication protected by the Fourteenth Amendment).

The fact that the rat enjoys 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*, 224 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. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

The use of stationary banners has received similar protection. *See, e.g., Overstreet v. United Bhd. 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”). There is “no doubt” the inflatable rat and stationary banners enjoy constitutional protection. *Grand Chute II*, 915 F.3d at 1123; *Ohr v. IUOE Local 150*, 2020 WL1639987 (N.D. Ill. April 2, 2020).

B. Labor Protest and the First Amendment

The General Counsel’s current efforts to regulate the use of rats and banners under Section 8(b)(4) rest upon blurring the distinction between handbills, banners, inflatable balloon figures, and street theatre recognized as “speech,” and picketing seen as “conduct.” General Counsel Advice Memorandum, *Int’l Bhd. of Elec. Workers Local 134 (Summit Design & Build)*,

Case No. 13-CC-225655 (December 20, 2018) (concluding that complaint should issue and the Board should reconsider *Eliason & Knuth*, *Brandon Medical Center*, and *Carpenters Sw. Reg'l Council Locals 184 & 1498 (New Star)*, 356 NLRB 613 (2011), to find that “the Union’s use of a banner and inflatable ‘fat cat’ was ‘tantamount to unlawful secondary picketing, and signal picketing”). The origins of First Amendment protection for publicizing labor disputes, however, encompass picketing, and any conduct absent violence likewise enjoys that protection.

In *Thornhill*, the Supreme Court considered whether a state statute titled, “Loitering or Picketing forbidden,” violated the First and Fourteenth Amendments to the Constitution. 310 U.S. 88 (1940). Petitioner Byron Thornhill had been convicted of violating the statute for picketing a company where a strike had been called several weeks prior. 310 U.S. at 93-94. He also stated to at least one non-union employee—in a “peaceful” and non-threatening manner—that “they were on strike and did not want anybody to go up there to work.” *Id.* at 94. After examining the constitutional freedoms and national policies at stake, the Court held that “the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in the state law. *Id.* at 105.

“Freedom of discussion,” the *Thornhill* Court explained, “if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable members of society to cope with the exigencies of their period.” 310 U.S. at 102. “The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.” *Id.* at 101-102. The Court added (*id.* at 102-103) (citations omitted):

Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the

right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem.

In the decade after *Thornhill*, the Supreme Court continued to apply the principles of the First Amendment and its goal of promoting free discussion. In *Swing*, the Court framed the issue, “is the constitutional guarantee of freedom of discussion infringed by the common law policy of a state of forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?” 312 U.S. at 323. The Court observed that the case presented “a substantial claim of the right of free discussion [a right which] is to be guarded with a jealous eye.” *Id.* at 325. The Court concluded, “The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ.” *Id.* at 326 (citation omitted).

Similarly, in *Thomas v. Collins*, 323 U.S. 516, 578 (1945), the Supreme Court examined a state requirement that union representatives obtain an “organizers card” before soliciting workers to join the union. The Union argued that such a requirement violated the First Amendment, as a previous restraint on rights of free speech and assembly. *Id.* The Court agreed, pointing out that the usual presumption supporting legislation is balanced by the “preferred place given in our scheme to the great and indispensable democratic freedoms secured by the First Amendment.” *Id.* at 529-530. Hence, “the right thus to discuss, and inform people concerning, the advantage and disadvantage of unions, and joining them is protected not only as part of free speech, but as part of free assembly.” *Id.* at 532.

The Supreme Court’s recent First Amendment jurisprudence echoes that of *Thornhill*, *Swing*, and *Collins* in its commitment to protecting robust debate on matters of public concern. Since at least the Court’s decision in *Citizen’s United v. Federal Election Commission*, 558 U.S. 310, 361 (2010), where it held federal regulation of corporate campaign expenditures based on the

speaker's "corporate identity" amounted to an "outright ban on corporate political speech in violation of the First Amendment," the Supreme Court has steadily expanded the scope of First Amendment protections. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (state law restricting sale, disclosure, and use of pharmacy records unconstitutional); *Snyder v. Phelps*, 562 U.S. 443 (2011) (picketing of veterans' funerals to protest American policies on gays in the military First Amendment-protected); *Reed v. Town of Gilbert*, 576 U.S. 155 (local sign ordinance limiting advertising unconstitutional content-based regulation of speech).

In *Snyder*, members of the Westboro Baptist Church picketed the funeral of Marine Lance Corporal Matthew Snyder, who was killed in Iraq in the line of duty. 562 U.S. at 448. The Church's position was that "the United States is overly tolerant of sin" and particularly homosexuality "and that God kills American soldiers as punishment." *Id.* at 447-448. To advance that view, the picketers stationed themselves on public land adjacent to public streets, with signs that included such statements as "God Hates the USA/Thank God for 9/11," "God Hates Fags," and "Thank God for Dead Soldiers." *Id.* at 448. The picketers "complied with police instructions in staging their demonstrations," and did not enter church or cemetery property. *Id.* "They did not yell or use profanity, and there was no violence associated with the picketing." *Id.* at 448-449.

After Matthew's father, Albert Snyder, won a multi-million dollar jury verdict for intentional infliction of emotional distress, the Court of Appeals overturned the verdict. *Snyder*, 562 U.S. at 450-451. "The Court reviewed the picket signs and concluded that Westboro's statements were entitled to First Amendment protection because those statements were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric." *Id.* at 451.

The Supreme Court agreed that so long as the speech challenged is a matter of public concern, it "occupies the highest rung of the hierarchy of First Amendment values, and is entitled

to special protection.” *Snyder*, 562 U.S. at 452, quoting *Connick v. Myers*, 401 U.S. 138, 145 (1983). The First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.” *Id.* at 452, quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). This is so because “speech concerning public affairs...is the essence of self government.” *Snyder*, 562 U.S. at 452, quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

Speech deals with matters of public concern where it can “be fairly considered as relating to any matter of political, social, or other concern to the community.” *Id.* at 453, quoting *Connick*, 401 U.S. at 146; or when it is the subject of general news interest. *Snyder*, 562 U.S. at 453. That the speech is arguably “inappropriate or controversial” is irrelevant. *Id.* “Deciding whether speech is of public or private concern” requires an examination of “context, form and content” based upon the entire record as a whole. *Id.* “No factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.” *Id.* at 454.

The Supreme Court concluded that by this analysis, Westboro’s speech was First Amendment protected as a matter of public concern. First, the “content” of the Westboro placards reading, “Thank God for IEDs,” “Fags Doom Nations,” and “Priests Rape Boys” “may fall short of refined social or political commentary,” but highlight issues concerning “the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy,” all of which “plainly relates to broad issues of society at large.” *Id.* at 454.

The manner in which Westboro delivered its message likewise connoted public speech. “The signs certainly convey Westboro’s position on those issues, in a manner designed...to reach as broad a public audience as possible.” *Snyder*, 562 U.S. at 454. Likewise, the context of

Westboro's speech, on public land next to a public street, fairly characterized it as "constituting speech on a matter of public concern." *Id.* at 454-458. Moreover (*id.* at 457):

Simply put, the church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.

Based upon these factors, the Court concluded that Westboro's speech was entitled to "special protection" under the First Amendment. *Id.*, 862 U.S. at 458. It explained (*id.* at 457):

The record confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. A group of parishioners standing at the very spot where Westboro stood, holding signs that said "God Bless America" and "God Loves You," would not have been subjected to liability. It was what Westboro said that exposed it to tort damages.

Local 150's use of inflatable rats and stationary banner displays fits squarely within the Supreme Court's analysis in *Snyder*. That the Union's conduct is *not* picketing (as is demonstrated, *infra*) only enhances Local 150's claim to First Amendment protection. The symbolic content of Scabby the Rat is its historic association with "rats" or "scabs" who refuse to honor strikes, replace strikers, or simply take anti-union positions. So too is the content of the banner casting "Shame on" the employer for harboring rat contractors, and publicizing OSHA workplace safety violations. Applying Section 8(b)(4) to render unlawful this display of the peaceful stationary banner and inflatables is content and viewpoint discrimination. As in *Snyder*, had Local 150's banners read, "Buy RVs" and "God Bless America and Lippert Components Inc.," there would be no unfair labor practice charge.

Local 150's displays were on public property, near a busy public street designed to reach as large an audience as possible. The Union sought to publicize its dispute with Lippert at a targeted audience of recreational vehicle consumers and the public at large. Rats and banners "Get

Attention,” *Grand Chute II*, 915 F.3d at 1123, and generate traditional and social media traffic.¹ The displays were at all times peaceful, non-confrontational, and there was no yelling, profanity, or amplified sound.

The General Counsel’s only response to the principle that the Union’s rat and banner displays are protected by the First Amendment is to assert that “it is settled law that the First Amendment does not shield unlawful secondary picketing.” (Counsel to the General Counsel’s Brief to the Administrative Law Judge at 25-26, filed June 18, 2019). The cases relied on by the General Counsel, however, are inapposite. In *DeBartolo*, 485 U.S. at 577-580, the Court reviewed cases involving peaceful consumer picketing at secondary sites beginning with *NLRB v. Fruit Packers*, 377 U.S. 58-63 (1964) (*Tree Fruits*). It found that decision made “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 dispute is ‘coercion’ within the meaning of § 8(b)(4)...even though, if the appeal succeeded, the retailer would lose revenue.” *DeBartolo*, 485 U.S. at 579. There was even less reason, the Court said, to find any clear indication Section 8(b)(4) meant “handbilling, without picketing, ‘coerces’ secondary employers.” *Id.* at 580. The Court added (*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 not more than what its customers honestly want it to do.

Nor is *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), of any value to the General Counsel. He argues that “a finding that the conduct here was not tantamount to picketing but was otherwise unlawfully coercive fails to raise First

¹ The Board’s October 27, 2020 Notice in this case has itself generated articles in the popular press, *see* R. Channick, “National labor board invites public to weigh in on whether to ban Scabby, the giant inflatable protest rat,” *Chicago Tribune Business*, October 28, 2020, and NPR interviews.

Amendment concerns since Local 150’s conduct is entitled to lesser First Amendment protection because it is labor and/or commercial speech” (Counsel for the General Counsel’s Brief to the Administrative Law Judge at 26). Apart from being obvious viewpoint discrimination, *Sorrell*, 564 U.S. 565, *Virginia State Bd.* says nothing of the sort. It stands for the proposition that speech which does “no more than propose a commercial transaction”—in the Court’s example, “I will sell you the X prescription for the Y price”—is nevertheless entitled to First Amendment protection. The arguments the General Counsel makes, moreover, that Local 150’s “speech” argued “the merits of Lippert’s business, as opposed to pressing some public benefit” is flatly contradicted one page later in the Court’s *Virginia State Bd.* opinion. It relies on *Thornhill* and *Swing* to determine that “the interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome.” *Virginia State Bd.*, 425 U.S. at 762.

C. The Principle of Constitutional Avoidance Requires the Board to Construe Rats and Banners as Outside the Scope of Section 8(b)(4).

The Supreme Court confronted the question of whether the secondary boycott prohibitions of Section 8(b)(4) were unconstitutional under the First Amendment in *DeBartolo*, 485 U.S. at 574-575. 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. The NLRB found the handbilling to violate Section 8(b)(4).

The Supreme Court invoked the “constitutional avoidance” rule of statutory construction applied in *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979), to reject the Board’s conclusion. *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. As the Court explained (*id.*) (citations omitted):

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.

The Court determined that 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 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.* (emphasis in original).

Since at least 2007, 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 handbilling and bannering to avoid the First Amendment problem.² In *Sheet Metal Workers’ Int. Ass’n. Local 15 v. NLRB*, 491 F.3d 429, 437-438 (D.C. Cir. 2007), the Court 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.* Nor was it “signal picketing” with an “implicit instruction” to union members the Court found the union’s conduct “fully consistent” with its “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*.” *Id.* at 439.

The NLRB itself finally adhered to the *DeBartolo* principles in finding stationary banners outside the scope of Section 8(b)(4)(ii)(B). In *Eliason & Knuth*, 355 NLRB at 803, 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.

² 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 Bhd. 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. Sw. Reg’l 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).

Relying on the constitutional avoidance doctrine applied in *DeBartolo*, the Board made clear that to rule otherwise would create a conflict with the First Amendment.

II. The NLRB's Cases Properly View Rats and Banners as Outside the Scope of Section 8(b)(4).

The ALJ correctly found that the Union's stationary display of a 12-foot inflatable rat and two large banners on public property located near the entrance of an RV trade show, a neutral site, did not constitute picketing or otherwise coercive nonpicketing conduct that violated Sections 8(b)(4)(i) and (ii)(B) of the Act.

A. *Eliason & Knuth* and *Brandon Regional Medical Center* Are Well-Reasoned and Consistent with Longstanding Board Law.

This Board should not overrule *Eliason* and *Brandon*. A union, like any other non-labor organization, has a First Amendment free speech right—a right that admittedly is not absolute, but that should not be infringed absent a compelling reason. Because of this, the Board in *Eliason* and *Brandon* correctly avoided an infringement of a union's free speech right and rightfully did not create a government regulation of speech. *Eliason*, 355 NLRB at 797; *Brandon*, 356 NLRB at 1293. Overruling *Eliason* and *Brandon*, especially on the facts of this case would result in government regulation of speech with no compelling reason for doing so.

Guided by its obligation to avoid a constitutional question, the *Eliason* and *Brandon* Board examined prior Supreme Court and Board caselaw, along with congressional history to determine what constitutes unlawful 8(b)(4) protest activity. The Board concluded that union protest activity that is merely persuasive is lawful even if the object of the persuasive activity is to induce a neutral employer to cease doing business with a primary employer. *Brandon*, 356 NLRB at 1291.

Persuasive protest activity is that which is devoid of violence, threats of violence, physical confrontation, blocking of entrances, verbal interference, or intentional business disruption.

Eliason, 355 NLRB at 802. Therefore, the persuasive protest activity of bannerling and the use of an inflatable rat at a neutral's place of business is a lawful appeal to the public absent violence, threats, physical confrontation, or business disruption. Without more, the mere presence of peaceful protest activity is pure speech.

The Board therefore has held that bannerling and the use of an inflatable rat at a neutral's business do not amount to unlawful 8(b)(4) picketing unless there is evidence of confrontational or disruptive conduct. *Id.* Thus, when the public is not confronted by union representatives and is free to ignore the union's message, there is no 8(b)(4) coercion. *Id.* There is simply no activity that compels infringing upon a union's free speech. Accordingly, the Board should not overrule *Eliason* and *Brandon*.

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 banners and use of Scabby was picketing or amounted to unlawful non-picketing coercive conduct. There is no evidence of confrontation or business disruption.

In order for bannerling 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 415, 417 (2011). As the Board notes in *Eliason*, "[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." 355 NLRB at 802. 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.*

In this case, there is a complete dearth of facts even remotely suggesting confrontation. There was no disruption of business, no blocking of any entrances. The rat and banners did not create any physical barrier between trade show-goers and the trade show, who were free to come and go unimpeded and not confronted by Local 150.

Likewise, there are no facts that show any coercive, non-picketing activity. 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).

Here, Local 150’s banners with their message of “Shame on Lippert” and of MacAllister’s OSHA violations, on their face, did not ask anyone to cease doing business with Lippert or MacAllister or Thor Industries. Indeed, Local 150 did not act inconsistent with its message. There is no evidence that Local 150 talked to anyone about anything. No one ceased doing business with Lippert, MacAllister, or Thor because of Local 150’s protest.

Additionally, Local 150’s use of Scabby did not amount to unlawful secondary activity. As the record facts disclose, Mr. Leazenby, Counsel for General Counsel’s own witness, testified Scabby was present to direct attention to Local 150’s message. He did not testify as to any patrolling, name-calling, bullhorns, mass picketing, the blocking of entrances, or violence. Mr. Leazenby offered no such evidence because none exists.

Since there was no evidence of disruption or coercion, Counsel for General Counsel relied solely on the size, look, and placement of Scabby to argue coercion. Local 150's placement of Scabby on the public right-of-way at the entrance to an industry trade show attended by customers of Lippert does not, should not, all by itself, amount to coercion of a neutral employer(s). Local 150 merely chose a location to communicate its message to anyone who might be interested in knowing that Lippert had a business relationship with MacAllister and that MacAllister had committed OSHA violations. The location proved to be embarrassing to Lippert and Thor. Embarrassment is not coercion. There is no evidence that any trade show-goers were impeded in any way or refused to enter because of the location or appearance of Scabby. Therefore, the Board should continue to hold that an inanimate inflatable balloon, merely placed on public property, unaccompanied by any confrontational conduct that does not impede ingress and egress, is not coercive and does not violate Section 8(b)(4).

B. The Use of Rats and Banners Are Not Tantamount to Picketing or Signal Picketing.

1. Peaceful displays of rats and banners are not “tantamount to picketing.”

The General Counsel argues that peaceful stationary rat and banner displays are “tantamount to picketing” with a string cite to cases which either involve “traditional picketing” or patrolling with signs and/or otherwise confrontational conduct. In *Serv. Emps. Union (Trinity Bldg. Maint. 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.” *Id.* 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. *Id.* at 745-749.

In the few instances in which the union did not use “conventional placards” in *Trinity*, 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.* 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].

See also Mine Workers Dist. 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); *NLRB v. Teamsters Local 182 (Woodward Motors)*, 314 F.2d 53 (2d Cir. 1963), enf. 135 NLRB 851, 858-859 and n.1 (1962) (placing picket signs in snowbank and union representatives persuading truck drivers not to make deliveries after three months of recognitional picketing and after union lost NLRB election violated Section 8(b)(7)); *Mine Workers Dist. 7 (Jeddo Coal Co.)*, 334 NLRB 677, 686-687 (2001) (stationing eight individuals across the street from entrance, with

one picket sign on one day, following repeated picketing at multiple locations over several months violated Section 8(b)(4)). Local 150's peaceful use of stationary rats and banners, accompanied by one or two individuals usually seated in vehicles or lawn chairs, bears no resemblance to the picketing and closely related conduct in these cases.

The General Counsel cherry-picks language from cases that has nothing to do with the conduct found to violate the Act. While some of the cited cases 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,³ 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 the General Counsel also usually engaged in other coercive

³ The cases relied upon by 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.” The Supreme Court, moreover, routinely refers to picketing as involving “patrolling.” *See, e.g., Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 503 n.6 (1949) (picketing is more than free speech since it involves a patrol of a particular locality).

conduct such as “mass picketing” (*Calcon*, 287 NLRB at 571 (20 to 25 persons carrying picket signs); *New Beckley*, 304 NLRB at 72; *Serv. Emps. Local 399 (William J. Burns Int’l 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); 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.

2. Displays of rats and banners used to publicize labor disputes are not “signal picketing.”

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’l Bhd. of Elec. 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 common 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).

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. 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 that case, 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...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.

The concept of signal picketing is inapplicable to this case. There were no reserved gates involved, and no actual conventional picketing. There was no other coercive activity as usually accompanies the finding of violations as in *Trinity*. 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. 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).

C. Rat and Banner Displays Are Not Otherwise Unlawfully Coercive.

The same day the Supreme Court issued its decision in *Swing* expanding the scope of First Amendment protection of picketing to include communication of the facts of a labor dispute with an employer to workers other than those “in his employ,” it decided *Milk Wagon Drivers Union v.*

Meadowmoor Dairies, 312 U.S. 287 (1941). The Court said in *Swing*, “we held the acts of picketing when blended with violence may have a significance which neutralizes the constitutional immunity which such acts would have in isolation.” 312 U.S. at 323. The Court described the union’s conduct in *Milk Wagon Drivers* (312 U.S. at 291-292):

Besides peaceful picketing of the stores handling Meadowmoor’s products, the master found that these had been violence on a considerable scale. Witnesses testified to more than fifty incidences of window-smashing, explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy...In more than a dozen of these occurrences, involving window-smashing, bombings, burnings, the wrecking of trucks, shootings, and beatings, there was testimony to identify the wrongdoers as union men.

The Court made it clear it was affirming *Thornhill* and its protection of peaceful picketing. *Milk Wagon Drivers*, 312 U.S. at 297. Nevertheless, injunctive relief is available to “deal with specific circumstances menacing the peace” such as “picketing en masse or otherwise conduct which might occasion such imminent and aggravated danger.” *Id.* Hence, state regulation of picketing is permissible where it found “that violence had given the picketing a coercive effect whereby it would operate destructively as force and intimidation.” *Id.* at 298.

The Court emphasized that “peaceful picketing is the workingman’s means of communication.” *Id.* at 293. “It must never be forgotten” that behind “the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind.” *Id.* Indeed, “it was in order to avert force and explosions due to restrictions upon rationed modes of communication that the guarantee of free speech was given to general scope.” *Id.*

Peaceful picketing is not coercion under the First Amendment. The NLRB’s General Counsel errs twice in arguing for a broad and flexible definition of picketing to encompass the peaceful use of rats and banners to publicize labor disputes. Not only are rats and banners not picketing, their use is not coercive under any of the Supreme Court’s First Amendment jurisprudence.

Conclusion

For all the above-stated reasons, Local 150 respectfully requests that the NLRB affirm the decision of the ALJ rendered July 15, 2019.

Dated: November 25, 2020

Respectfully submitted,

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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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