

**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 RESPONSIVE BRIEF IN SUPPORT
OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Attorneys for Local 150:
Dale D. Pierson (*dpierson@local150.org*)
Melinda S. Burleson (*mburleson@local150.org*)
Charles R. Kiser (*ckiser@local150.org*)
Local 150 Legal Department
6140 Joliet Road
Countryside, IL 60525
Ph. 708/579-6663
Fx. 708/588-1647

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Pursuant to the “Notice and Invitation to File Briefs” entered October 27, 2020, on November 25, 2020, Respondent International Union of Operating Engineers, Local 150, AFL-CIO (“Local 150” or “the Union”), filed its “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 explained 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 other 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). 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 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. Supplemental briefing, including that of numerous *amici*, was completed December 28, 2020.

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. 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.

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); *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. 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).

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 bannering and the use of an inflatable rat at a neutral's place of business is a lawful appeal to the public. Without more, the mere presence of peaceful protest activity is pure speech.

The Board therefore has held that bannering 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 order for bannering 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,¹ 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 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*

¹ 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).

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). “Reserved gate” systems are common 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).

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 *Lippert*. There were no reserved gates involved, and no actual conventional picketing. 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).

III. The Facts of this Case Do Not Support a Return to a Pre-*Eliason* and *Brandon* Standard for Determining Picketing or for Finding Scabby and/or Bannering to be 8(b)(4) Coercive.

This Board should continue to adhere to *Eliason* and *Brandon*. 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. General Counsel, in attempting to create a compelling reason, relies solely on conclusory allegations that Local 150’s

use of Scabby and its banners amounted to coercive conduct with a cease-doing-business objective. General Counsel does so because there is no evidence in the record to support coercion.

Guided by its obligation to avoid a constitutional question, the *Eliason* and *Brandon* Board concluded that union protest activity which 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 bannering and the use of an inflatable rat at a neutral's place of business is a lawful appeal to the public.

In this case, 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. Local 150 did not act inconsistent with its message to the public. There is no evidence that Local 150 talked to anyone at the trade show about anything. There is no evidence that anyone ceased doing business with Lippert, MacAllister, or Thor because of Local 150's protest. Likewise, there is no evidence of disruption, patrolling, or confrontation. The evidence squarely to the contrary shows two Local 150 representatives simply sitting in lawn chairs minding the Union's property: Scabby and its banners.

Contrary to General Counsel's naked assertion, Local 150's use of Scabby did not create a symbolic confrontational barrier. Indeed, there is no evidence that anyone refused to enter the trade show because of Local 150's protest. Rather, as the record facts disclose, Leazenby, General Counsel's witness, Leazenby, 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, blocking of entrances, or violence. Mr. Leazenby offered no such evidence because none exists.

Absent evidence of disruption or coercion, General Counsel relies solely on the size, look, and placement of Scabby to argue a violation of Section 8(b)(4). 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 is not 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.

It should not be disputed that facts mean something. Anyone can say something is true, but, can they prove it with facts? Here, General Counsel says that Local 150's conduct violated the Act, but cannot prove it with facts because none exist to support his theory. Therefore, the Board should continue to hold that an inanimate inflatable balloon, placed on public property, unaccompanied by any confrontational or disruptive conduct and that does not impede ingress and egress, is neither picketing nor coercive and thus, does not violate Section 8(b)(4).

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: January 11, 2021

Respectfully submitted,

By: /s/ Dale D. Pierson
One of the Attorneys for Local 150

Attorneys for Local 150:
Dale D. Pierson (*dpierson@local150.org*)
Melinda S. Burleson (*mburleson@local150.org*)
Charles R. Kiser (*ckiser@local150.org*)
Local 150 Legal Department
6140 Joliet Road
Countryside, IL 60525
Ph. 708/579-6663
Fx. 708/588-1647

CERTIFICATE OF SERVICE

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

Patricia K. Nachund, Regional Director (*patricia.nachund@nlrb.gov*)
National Labor Relations Board, Region 25
575 North Pennsylvania Street, Suite 238
Indianapolis, IN 46204-1520

Michael T. Beck, Supervisory Attorney (*michael.beck@nlrb.gov*)
Tiffany Limbach, Field Attorney (*tiffany.limbach@nlrb.gov*)
National Labor Relations Board, Region 25
575 North Pennsylvania Street, Suite 238
Indianapolis, IN 46204-1520

Brian West Easley (*beasley@jonesday.com*)
Elizabeth Bentley (*ebentley@jonesday.com*)
Jones Day
90 South Seventh Street, Suite 4950
Minneapolis, MN 55402

Allyson Werntz (*awerntz@jonesday.com*)
Jones Day
77 West Wacker Drive
Chicago, IL 60601

and via facsimile on the following:

Lippert Components, Inc.
3501 County Road 6
Elkhart, IN 46514
Fx. 844/345-3178

By: /s/ Dale D. Pierson
One of the Attorneys for Local 150

Attorneys for Local 150:
Dale D. Pierson (*dpierson@local150.org*)
Melinda S. Burleson (*mburleson@local150.org*)
Charles R. Kiser (*ckiser@local150.org*)
Local 150 Legal Department
6140 Joliet Road
Countryside, IL 60525
Ph. 708/579-6663
Fx. 708/588-1647