International Union of Operating Engineers, Local Union No. 150 a/w International Union of Operating Engineers, AFL–CIO *and* Lippert Components, Inc. Case 25–CC–228342

July 21, 2021

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, EMANUEL, AND RING

On July 15, 2019, Administrative Law Judge Kimberly Sorg-Graves issued the attached decision. The General Counsel filed exceptions and a supporting brief. On October 27, 2020, the National Labor Relations Board issued a Notice and Invitation to File Briefs to afford the parties and interested amici the opportunity to address the judge's application of *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 resolve the issue of whether the display of an inflatable rat and banners near the entrance to a neutral site violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act.[1] The Board received 30 briefs in response to the Notice and Invitation.[2]

The Board has considered the decision and the record in light of the exceptions and many briefs and has decided to affirm the judge's rulings, findings, and conclusions[3] and to adopt the recommended Order dismissing the complaint.[4]

In finding lawful the inflatable rat and banner display at issue in this case, the judge relied in part on the Board's decisions in *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). These cases held, respectively, that displaying banners or an inflatable rat near the entrance of a neutral employer, without more, does not "threaten, coerce, or restrain" the neutral in violation of Section 8(b)(4)(ii)(B). We address this precedent in separate concurring opinions. For the reasons stated there, we agree with the judge that the allegation that the Respondent violated Section 8(b)(4)(ii)(B) must be dismissed.[5]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 21, 2021

Lauren McFerran, Chairman

[1] 370 NLRB No. 40. The notice afforded the parties and interested amici the opportunity to address the following questions:

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 Sec. 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 Sec. 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?

[2] The General Counsel and the Respondent filed briefs, and the Respondent also later filed a responsive brief. Amicus or amici curiae briefs were filed by Associated Builders and Contractors; American Civil Liberties Union and American Civil Liberties Union of Indiana, jointly; American Federation of Labor and Congress of Industrial Organizations, and North America's Building Trades Unions, jointly; Associated General Contractors of America; Coalition for a Democratic Workplace, Chamber of Commerce of the United States, Independent Electrical Contractors, Inc., National Association of Wholesaler-Distributors, and National Federation of Independent Business, jointly; Chicago Regional Council of Carpenters; Council on Labor Law Equality; District Council of New York City & Vicinity of the United Brotherhood of Carpenters and Joiners of America; Eastern Atlantic States Regional Council of Carpenters; Illinois American Federation of Labor-Congress of Industrial Organizations, Chicago Federation of Labor, and Chicago and Cook County Building & Construction Trades Council, jointly; International Brotherhood of Electrical Workers, Local 134; International Brotherhood of Electrical Workers, Local 304; International Union of Bricklayers and Allied Craftworks; International Union of Operating Engineers; Laborers' International Union of North America; Needham Excavating, Inc.; New York State Building & Construction Trades Council, North America's Building Trades Unions, AFL–CIO; Northern California Carpenters Regional Council; Painters District Councils No. 14 & 30, International Brotherhood of Electrical Workers Local 117, 150, 176, and 701, DuPage Building & Construction Trades Council, Will & Grundy Construction Trades Councils, and Teamster Local 673, jointly; Professors Robert A. Gorman and Matthew W. Finkin; Retail Industry Leaders Association, National Retail Federation, and International Council of Shopping Centers, jointly; Service Employees International Union; UNITE HERE Local 1; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO; United Brotherhood of Carpenters and Joiners of America; University of Wisconsin-Madison School for Workers; and Weinberg, Roger & Rosenfeld, P.C.

[3] To the extent that language in the judge's decision could be read to imply that the provisions of the National Labor Relations Act define the scope of First Amendment protections, we do not rely on that language.

[4] On February 2, 2021, the Acting General Counsel filed a Motion to Remand the Complaint to the Regional Director for Dismissal or, Alternatively, to Dismiss the Complaint. With this decision on the merits, the Acting General Counsel's motion is moot.

[5] We also agree with the judge, for the reasons she stated, that the Respondent did not engage in signal picketing in violation of Sec. 8(b)(4)(i)(B).

Marvin E. Kaplan, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, concurring.

In today's decision, a majority of the Board agrees that the display of the banners and inflatable rat at issue here do not violate Section 8(b)(4)(ii)(B) of the National Labor Relations Act, and that the complaint should be dismissed.[1] I believe that this outcome is dictated by the Board's decisions in *Eliason & Knuth* and *Brandon Regional Medical Center*, which held that such displays, under analogous circumstances, did not violate the Act's secondary boycott provisions.[2] The Board must follow its own precedents, and those precedents are directly applicable in this case.[3]

While my concurring colleagues may not agree with every aspect of *Eliason* and *Brandon*, they endorse a core rationale of those decisions: under the constitutional avoidance doctrine, the potential infringement of a union's First Amendment rights precludes the Board from finding that the banners and inflatable rat in these circumstances violate Section 8(b)(4)(ii)(B). I agree with them (and with *Eliason* and *Brandon*) that because our statute need not be interpreted to reach the constitutionally protected conduct here, the Board should decline to interpret it that way.

In this regard, I also believe my colleagues have homed in on the dissent's central flaw. Member Emanuel's contention that in this case non-speech intimidation predominates over any expressive element—resulting in diminished constitutional protection for, and legitimate restriction of, the Union's activities—is simply contrary to overwhelming court precedent, which protects a wide range of expressive activity, including offensive speech.[4] Indeed, as my concurring colleagues correctly point out (and as *Eliason* explained), the Supreme Court's holding in *DeBartolo*—that expressive activity directed at a neutral employer's customers does not violate the Act—cannot tenably be limited to the handbilling at issue in that case and readily applies to the Union's display here.[5] Accordingly, the courts have consistently deemed banners and inflatable rats to fall within the realm of protected speech, rather than that of intimidation and the like.[6]

However, I do not join my concurring colleagues' discussion, in dictum, on aspects of *Eliason* and *Brandon* that are unnecessary to decide this case (and are thus unaffected by today's decision). My colleagues take issue with those cases' holding that, apart from traditional picketing, Section 8(b)(4)(ii)(B) encompasses only conduct that directly causes disruption, or would reasonably be expected to cause disruption, of a neutral employer's operations. As my colleagues observe, this case does not require us to

[1] We also agree, for the reasons stated by the judge, that the Union's conduct here does not violate Sec. 8(b)(4)(i)(B).

[2] See *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797 (2010); *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB 1290 (2011).

[3] See, e.g., *International Longshore & Warehouse Union v. NLRB*, 978 F.3d 625, 633 (9th Cir. 2020) ("[A]bsent explanation, [the Board must] adhere to its own precedent . . . .").

[4] See *Sheet Metal Workers Local 15 v. NLRB*, 491 F.3d 429, 439 (D.C. Cir. 2007) (holding mock funeral to communicate labor dispute did not violate Sec. 8(b)(4)(ii)(B), and observing that "unsettling and even offensive speech is not without the protection of the First Amendment"); *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1212–1213 (9th Cir. 2005) (concluding that restrictions on stationary banners "would pose a 'significant risk' of infringing on First Amendment rights," and thus, in absence of clear evidence that Congress intended stationary banners to be covered, the Act should be interpreted to permit such banners).

[5] See *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988).

[6] See *Ohr v. Operating Engineers Local 150*, 2020 WL 1639987 (N.D. Ill. 2020) (denying Sec. 10(l) preliminary injunction in case involving inflatable rat and banners); *All-City Metal, Inc. v. Sheet Metal Workers Local 28*, 2020 WL 1466017 (E.D.N.Y. 2020) (dismissing Sec. 303 suit allegations that fliers and inflatable rat were unlawful); *King v. Laborers Local 79*, 393 F. Supp. 3d 181 (E.D.N.Y. 2019) (denying 10(l) injunction in case involving inflatable rat and cockroach along with signs and handbilling); Compass *Construction v. Ind./Ky./Ohio Regional Council of Carpenters*, 890 F. Supp. 2d 836 (S.D. Ohio 2012) (dismissing Sec. 303 suit allegations regarding banners and handbilling). Cf. *Chef's Warehouse, Inc. v. Wiley*, 2019 WL 4640208 (S.D.N.Y. 2019) (observing there is a constitutional right to use an inflatable rat to publicize a labor dispute, but denying motion to dismiss based on threats of mobs, picketing and disruption in addition to use of rat); *Premier Floor Care Inc. v. SEIU*, 2019 WL 2635540 (N.D. Cal. 2019) (noting lawfulness of stationary banners, but denying summary judgment in Sec. 303 suit based on allegations of physical confrontation and disruption); *Ameristar Casino E. Chicago, LLC v. UNITE HERE Local 1*, 2018 WL 4052150 (N.D. Ill. 2018) (leafleting and banner allegations dismissed on summary judgment in Sec. 303 suit, but suit allowed to proceed on allegations that included blocking of an entrance); *BD Development, LLC* v. *Laborers Local 79*, 2018 WL 1385891 (E.D.N.Y. 2018) (denying summary judgment in Sec. 303 suit and holding that it need not rule on lawfulness of inflatable rat since coercive activity including blocking entrance was also alleged); W2005 *Wyn Hotels, L.P. v. Laborers Local 78*, 2012 WL 955504 (S.D.N.Y. 2012) (questions concerning exact placement of inflatable rat relative to entrance, along with allegations of impeding entry of customers and employees, gave rise to question of whether conduct was coercive and thus precluded dismissal of Sec. 303 suit); *Circle Group, L.L.C. v. SE Carpenters Regional Council*, 836 F. Supp. 2d 1327 (N.D. Ga. 2011) (in Sec. 303 suit, noting the unique character of demonstrations and bannering at homes and schools of the families of secondary employers and thus finding issue of fact as to whether they were coercive).

interpret the exact parameters of *Eliason* and *Brandon*. Most importantly, *Eliason* and *Brandon* made clear that the displays here fall within the realm of expressive conduct not subject to Section 8(b)(4)(ii)(B) under Supreme Court precedent applying the constitutional avoidance doctrine, and this element of their holding is dispositive of this case. Because my two concurring colleagues and I agree with this proposition, today's decision need not determine the extent to which other secondary conduct, not outside the constitutional boundaries of this provision, might violate the Act.

In short, adhering to Board precedent, I concur in the result here, and I agree with my concurring colleagues in both their application of the constitutional-avoidance doctrine and their rejection of the dissent's contrary view.

Dated, Washington, D.C. July 21, 2021

Lauren McFerran, Chairman

NATIONAL LABOR RELATIONS BOARD

MEMBERS KAPLAN AND RING, concurring.

The question presented in this case is whether the Respondent Union violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act by displaying a 12-foot-tall inflatable rat and two stationary banners measuring 8-by-3.75 feet near an entrance to a recreational-vehicle (RV) trade show hosted by Thor Industries, an RV manufacturer. This display targeted Lippert Components, a company that supplied components for Thor's RVs and that did business with MacAllister Machinery. The Union had a labor dispute with MacAllister, not with Lippert or Thor; its objective was to force Lippert to cease doing business with MacAllister.[1]

In traditional labor law parlance, Lippert was a "secondary" or "neutral" employer. Congress enacted Section 8(b)(4) to protect neutral employers from being enmeshed in labor disputes not their own. We share our dissenting colleague's view that the Board must remain committed to the vigorous enforcement of this prohibition, which is vital to achieving one of the Act's chief goals: safeguarding commerce from disruptions.[2] As important as this protection of neutral employers is, however, the Supreme Court has made clear that enforcement of the Act's proscriptions of secondary activity can conflict with First Amendment rights. Decades of binding Supreme Court precedent direct us on where the line must be drawn between constitutionally protected persuasion and expressive activity, on the one hand, and threats, coercion, and restraint rightly subject to interdiction. In our view, this precedent compels the conclusion that the rat-and-banner display at issue here does not fall within the ambit of Section 8(b)(4)'s prohibitions. Accordingly, we concur in dismissing the complaint.[3]

Discussion

The National Labor Relations Act is premised on Congress' judgment that protection of the right to organize and bargain collectively "promotes the overall design of achieving industrial peace." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 488 (1960). This design was undermined, however, when unions sought to expand labor disputes beyond the employer directly involved in the dispute (the "primary" employer) by picketing and inducing work stoppages at employers with whom the primary employer did business ("secondary" or

[1] More specifically, the rat and banners were positioned near the public entrance to the trade show, such that attendees of the show had to drive past them to park their cars. The inflatable rat had red eyes, fangs, and claws. The banners read "OSHA Found Safety Violations Against MacAllister Machinery, Inc." and "SHAME ON LIPPERT COMPONENTS, INC., FOR HARBORING RAT CONTRACTORS." Two agents of the Union sat next to the rat and stationary banners. They did not march, patrol, or distribute materials. They also did not shout, chant, or verbally confront trade-show patrons.

[2] In relevant part, Sec. 1 of the Act states that

> certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in . . . commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

[3] In addition to alleging that the rat-and-banner display violated Sec. 8(b)(4)(ii)(B), the complaint alleged that the display also violated Sec. 8(b)(4)(i)(B), which outlaws so-called signal picketing. Signal picketing is picketing that sends an implicit signal to unionized employees of a neutral employer "that sympathetic action on their part is desired," i.e., that they should cease work. *Electrical Workers Local 98 (Telephone Man)*, 327 NLRB 593, 593 fn. 3 (1999). We agree with the judge that the Union did not engage in signal picketing. Neither the banners nor the inflatable rat called for or declared any kind of job action by employees of any neutral employer, and nothing about them conveyed any generally understood signal to cease work. There is also no evidence that any employee, unionized or not, ceased working in response to this display. Moreover, banners and inflatable rats had been in use for at least 7 years prior to the display at issue in this case without any indication that they had *ever* induced a secondary work stoppage. As the judge aptly noted, if the Union "was trying to signal the secondary employees to cease working, I would think that they would have found a more fruitful signal in the intervening 7 years." Accordingly, the Union did not violate Sec. 8(b)(4)(i)(B), and this concurrence solely addresses the 8(b)(4)(ii)(B) allegation.

"neutral" employers), who had no stake in the dispute. To prevent these secondary boycotts, Congress enacted Section 8(b)(4) in 1947 as part of the Taft-Hartley Act.[4] When loopholes were found in the protection it afforded, Congress closed them through further amendments in 1959.[5]

As the Supreme Court recognized 70 years ago, the Act as amended to include Section 8(b)(4) embodies "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951). But Section 8(b)(4) does not prohibit *all* union activity having the proscribed secondary objective of "forcing or requiring any person to . . . cease doing business with any other person." Instead, as relevant here, Section 8(b)(4)(ii)(B) makes it an unfair labor practice for a union, with that proscribed objective, to "threaten, coerce, or restrain any person."[6] Moreover, the words "to threaten, coerce, or restrain" are "nonspecific, indeed vague," and the Supreme Court has instructed that the Board should exercise "caution" when interpreting the scope of the section and not give it "broad sweep." *NLRB v. Drivers, Chauffeurs, Helpers, Local 639*, 362 U.S. 274, 290 (1960). Section 8(b)(4), the Court has explained, does not constitute "[a] wholesale condemnation of secondary boycotts" but instead manifests Congress' intent to "condemn[] specific union conduct directed to specific objectives." *Sand Door*, 357 U.S. at 98–99.[7]

In *Drivers, Chauffeurs, Helpers, Local 639*, the Court based its cautionary instruction against broad application of Section 8(b)(4) on the legislative history of Taft-Hartley. 362 U.S. at 289–290. An even more compelling reason to avoid giving the language of Section 8(b)(4) "broad sweep" is that doing so may conflict with the Constitution. See, e.g., *Tree Fruits*, 377 U.S. at 63 ("[A] broad ban against peaceful picketing might collide with the guarantees of the First Amendment.").

The Supreme Court addressed this latter potential conflict most fully in *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988). The issue in *DeBartolo* was whether the respondent union had violated Section 8(b)(4)(ii)(B) by engaging in "peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer." Id. at

[4] See *Carpenters Local 1976 v. NLRB*, 357 U.S. 93, 100–101 (1958) (*Sand Door*) (Sec. 8(b)(4) aimed at prohibiting the "dangerous practice of unions to widen" conflicts with primary employers to include "the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods."); *Electrical Workers Local 761 v. NLRB*, 366 U.S. 667, 672 (1961) (Sec. 8(b)(4) was "directed toward what is known as the secondary boycott whose 'sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it.'") (quoting *Electrical Workers Local 501 v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950)); *NLRB v. Retail Store Employees, Local 1001*, 447 U.S. 607, 616 (1980) (*Safeco*) ("[S]econdary picketing calculated 'to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer' . . . . spreads labor discord by coercing a neutral party to join the fray.") (quoting *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760*, 377 U.S. 58, 63 (1964) (*Tree Fruits*)).

[5] As amended, Sec. 8(b)(4) relevantly provides that it shall be an unfair labor practice for a labor organization

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> . . .
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

[6] The secondary objective need not be the union's sole object for its conduct to come within the prohibition of the Act. Sec. 8(b)(4)(ii)(B) requires only that a "cease doing business" objective be *an* object of union threats, coercion, or restraint.

[7] *International Longshoremen's Assn. v. Allied International, Inc.*, 456 U.S. 212 (1982), cited by our dissenting colleague, is not to the contrary. There, the Supreme Court rejected the claim that an exception to permit secondary boycotts involving political disputes—namely, a refusal to unload cargo shipped from the Soviet Union to protest that nation's invasion of Afghanistan—should be read into Sec. 8(b)(4). In rejecting the proposed exception, the Court observed that

> Section 8(b)(4) contains no such limitation. In the plainest of language, it prohibits "forcing . . . any person to cease . . . handling . . . the products of any other producer . . . or to cease doing business with any other person." The legislative history does not indicate that political disputes should be excluded from the scope of § 8(b)(4). The prohibition was drafted broadly to protect neutral parties, "the helpless victims of quarrels that do not concern them at all."

Id. at 225. These observations regarding the permissibility of the proposed nonstatutory exception to Sec. 8(b)(4) have no bearing on the separate issue of whether the terms "threaten, coerce, or restrain," which do appear in the statute and limit its scope, should be read broadly. As shown, the Court has squarely rejected that view.

583–584.[8] Observing that this was, "[o]n its face, . . . expressive activity," the Court found that construing Section 8(b)(4)(ii)(B) to prohibit this conduct would "pose[] serious questions of the validity of § 8(b)(4) under the First Amendment." Id. at 575, 576. Accordingly, the Court invoked the doctrine of constitutional avoidance, under which, "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. In other words, even if Section 8(b)(4)(ii)(B) *could* be read to make the conduct at issue in *DeBartolo* unlawful, *must* it be so read? The Court answered that question in the negative. Although that conduct clearly had a proscribed "cease doing business" object, Section 8(b)(4)(ii)(B) prohibits only threats, coercion, or restraint, and the Court found none of that. "There was no violence, picketing, or patrolling and only an attempt to persuade customers not to shop in the mall." Id. at 578. Accordingly, the Court concluded that the respondent union had not violated Section 8(b)(4)(ii)(B).

DeBartolo concerned handbilling, and the instant case does not. In our view, however, *DeBartolo* cannot persuasively be limited to handbilling. The Court therein set forth an analytical framework that applies to any form of secondary union activity alleged to violate Section 8(b)(4)(ii)(B). In this regard, the key passage in *DeBartolo* is its discussion of *Safeco*, supra. In *Safeco*, the Court was presented with a set of facts indistinguishable from those at issue in *DeBartolo* in all material respects but one: in *Safeco*, the union picketed—and the Court held the union's conduct "coercive and prohibited by § 8(b)(4)." 485 U.S. at 579. To reconcile *Safeco*, then, the Court in *DeBartolo* had to explain why that sole distinction was dispositive. "[P]icketing," it said, "is qualitatively different from other modes of communication," id. at 580 (internal quotation marks omitted), and in support, it relied on Justice Stevens' rationale in his *Safeco* concurrence. There, Justice Stevens reasoned that

> picketing is a mixture of conduct and communication. In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment. In his concurring opinion in *Bakery Drivers v. Wohl* [citation omitted], Mr. Justice Douglas stated: 'Picketing by an organized group is more than free speech, . . . since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.' Indeed, no doubt the principal reason why handbills containing the same message are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea.

Safeco, 447 U.S. at 619 (Stevens, J., concurring in part). In other words, while picketing does have an element of communication, it aims to achieve its objective predominantly through intimidation, whereas peaceful handbilling seeks only to persuade—a distinction the Court in *DeBartolo* emphasized: "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." 485 U.S. at 580.

Thus, where secondary union activity seeks to achieve its objective through intimidation, it may be found unlawful without "pos[ing] serious questions of the validity of § 8(b)(4) under the First Amendment." Id. at 575. But where such activity—handbilling or otherwise—employs "mere persuasion" to achieve its goal, the Board must avoid raising those questions and find that the conduct does not violate Section 8(b)(4).

Applying these principles, we agree with the judge that the Union's display of an inflatable rat and stationary banners did not violate Section 8(b)(4)(ii)(B). Interpreting that statutory provision to prohibit this display would raise serious First Amendment issues. The display of the banners and inflatable rat was clearly expressive activity, conveying the Union's message that MacAllister had committed OSHA violations and was a "rat contractor," that Lippert should be ashamed to do business with it, and, implicitly, that MacAllister's alleged conduct should be opposed by abstaining from doing business with Lippert. See *DeBartolo*, 485 U.S. at 575, 576 (application of Sec. 8(b)(4) to leafleting would "pose[] serious questions of the validity of § 8(b)(4) under the First Amendment" because "[o]n its face," the union's conduct "was expressive activity arguing that substandard wages should be opposed by abstaining from shopping in a mall where such wages were

[8] In *DeBartolo*, the union had a labor dispute with a construction company over wages and benefits, a department store hired that company to build a store in a shopping mall, and the union distributed handbills at entrances to the mall asking customers to boycott the mall's stores until the mall's owner agreed that construction would only be completed by contractors who paid fair wages and benefits. Id. at 570. More specifically, the handbills asked customers "not to shop at any of the stores in the mall 'until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits,'" explaining that the "payment of substandard wages not only diminishes the working person's ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community." Id. at 570–571 fn. 1.

paid"). Indeed, the Supreme Court has repeatedly held that other confrontational—and far more offensive—forms of expressive activity are within the protection of the First Amendment. See *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Virginia v. Black*, 538 U.S. 343 (2003) (cross burning); *Snyder v. Phelps*, 562 U.S. 443 (2011) (anti-homosexual demonstration near service member's funeral featuring signs reading, among other things, "Fags Doom Nations" and "Thank God for Dead Soldiers"). Surely, if the First Amendment protects this conduct, prohibiting an inflatable rat and stationary banners shaming a secondary employer would raise significant constitutional concerns in the eyes of the Court. Moreover, that Lippert found the Union's display "embarrassing" does not outweigh the First Amendment rights implicated here. See *Hill v. Colorado*, 530 U.S. 703, 716 (2000) ("[T]he right to attempt to persuade others . . . may not be curtailed simply because the speaker's message may be offensive to his audience.").

As the Court explained in *DeBartolo*, the appropriate question under the constitutional avoidance doctrine is not whether Section 8(b)(4)(ii)(B) *could* be read to apply to the Union's display, but whether it *must* be so read. We conclude such a reading is not compelled here. The Union's conduct did not rise to the level of threats, coercion, or restraint proscribed by Section 8(b)(4)(ii)(B). Unlike in *Safeco,* the trade show attendees in this case were not confronted "by a line of picketers." *DeBartolo,* 485 U.S. at 580. Nor were they required to pass through a gauntlet of chanting or shouting individuals in order to enter the trade show. Indeed, they were not confronted by anyone; they merely had to drive past the display on their way to the parking lot. The two union agents present at the display did not, by word or deed, confront or threaten attendees or act aggressively in any way. Neither did they patrol the area, much less carry signs or props. Rather, they remained seated alongside the banners. The banners themselves were similar to billboards, and the attendees' interaction with them as they drove past was not materially different from driving past and reading a billboard displaying the same message or, for that matter, reading it in a leaflet. Such communications achieve their effect by "mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do." Id.

Also, we are not persuaded that the inflatable rat must be deemed intimidating and coercive within the meaning of Section 8(b)(4) because of its size or appearance. To be sure, the rat symbolically expressed the Union's contempt for MacAllister as a "rat"—and for Lippert for doing business with MacAllister. But any impact achieved by the application of this label is a result of "mere persuasion," not proscribed intimidation. Simply put, to find a violation under the circumstances here would put the Board squarely at odds with decades of precedent interpreting Congress' intent in enacting Section 8(b)(4)(ii)(B).

For the foregoing reasons, we agree with the result reached in *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797 (2010) (banners), and *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB 1290 (2011) (inflatable rat), where prior Boards held that union displays of banners and an inflatable rat at secondary employers' worksites did not violate Section 8(b)(4). But we do not agree with the reasoning of those decisions to the extent that they attach decisive significance to whether disputed union conduct has the same attributes as "traditional picketing" or, if not, whether it disrupts the neutral employer's operations.[9] As the *Eliason & Knuth* dissenters persuasively explained, Congress intended that Section 8(b)(4)

> be applied flexibly and sensibly, drawing upon the Board's unique expertise, to protect neutrals from a broad range of coercive secondary activity, and that the Section's prohibitions were not limited to secondary activity that involved violence, intimidation, blocking ingress and egress, or similar direct disruption of the secondaries' business.

355 NLRB at 814. Indeed, just recently, the Board found that a union violated Section 8(b)(4)(ii)(B) by playing audio of a crying baby at a coercively loud volume at a secondary employer's worksite. See *Electrical Workers, Local 98 (Post General Contracting)*, 370 NLRB No. 51 (2020). While Section 8(b)(4) is not so broad as to prohibit the display at issue in this case, neither may it properly be narrowed in the manner posited by the *Eliason & Knuth* and *Brandon* majorities.[10] Instead, as the Court instructed in *Tree Fruits*, the prohibition

[9] See *Eliason & Knuth,* 355 NLRB at 802, 805 (limiting Sec. 8(b)(4)(ii)(B) to picketing—defined as "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"—and "nonpicketing conduct" that "directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations").

[10] As explained above, notwithstanding our disagreement with these aspects of the *Eliason & Knuth* and *Brandon* opinions, the conduct at issue in this case must be found lawful under Sec. 8(b)(4).

of Section 8(b)(4) "is keyed to the coercive nature of the conduct, whether it be picketing or otherwise." 377 U.S. at 68.[11]

Conclusion

The National Labor Relations Act is premised on Congress' policy determination that interstate commerce is best safeguarded by protecting the right of employees to organize and bargain collectively, while also prohibiting union practices that entangle neutrals in labor disputes not their own and thereby "impair the interest of the public in the free flow of such commerce."[12] The Board is entrusted with the enforcement of that policy, within the limits set by Congress as interpreted by the Supreme Court. The Court's precedent requires the Board to respect First Amendment rights and avoid applying Section 8(b)(4) in a way that raises questions regarding the constitutionality of that statutory provision. Consistent with these principles, we believe that the complaint in this case must be dismissed. Accordingly, for all the foregoing reasons, we respectfully concur.

Dated, Washington, D.C. July 21, 2021

Marvin E. Kaplan, Member

John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER EMANUEL, dissenting.

The display of large inflatable rats and associated bannering conduct by unions to embroil neutral parties in labor disputes has provoked immense controversy. The problem has become more hotly contested since a closely divided Board placed its imprimatur on such secondary conduct in *Sheet Metal Workers Local 15 (Brandon Medical Center)*[1] and *Carpenters Local 1506 (Eliason & Knuth of Arizona*),[2] which cases the Board summarily reaffirms today. Neutral employers rightfully expect to be spared entanglement from labor disputes under Section 8(b)(4) of the Act, which "shield[s] unoffending employers . . . from pressures in controversies not their own" while preserving a range of permissible union conduct against the offending primary employer. *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951). This case presents a ripe opportunity to recalibrate the balance between these dual statutory objectives. My Board colleagues in a broad variety of other labor disputes have embraced the opportunity to tailor federal labor law to a more balanced approach among competing interests. The Board should do the same here by overruling *Brandon Medical Center* and *Eliason & Knuth of Arizona* and concluding that the Union's 4-day rat-and-banner display is tantamount to picketing or, in the alternative, was coercive nonpicketing conduct, and therefore violated Section 8(b)(4)(ii)(B) of the Act.[3] I therefore respectfully dissent.

I.

The facts in this case are undisputed. The Union had a primary labor dispute with MacAllister Machinery, Inc. (MacAllister), and had no primary dispute with the Charging Party, Lippert Components, Inc. (Lippert). Lippert, which rents equipment from MacAllister, is a major supplier of components to the recreational vehicle industry. The Union took aim at Lippert at one of the largest trade shows in the United States for recreational vehicles, held in Elkhart, Indiana. The 4-day trade show was hosted by Thor Industries, a prominent American manufacturer of recreational vehicles. Thor Industries is one of Lippert's largest customers, annually purchasing approximately $800 million worth of goods from Lippert. The trade show provides a platform for suppliers to the recreational vehicle industry to display their products. Lippert's products and services were displayed at the Recreational Vehicle Hall of Fame in Elkhart, and the trade show spanned the grassy area on either side of the Hall of Fame.

At the entrance to the trade show, the Union erected an imposing 12-foot inflatable rat, replete with red eyes, fangs, and claws. Adjacent to the giant rat, the Union displayed two large banners, each measuring about 8 feet by 4 feet. One of the banners declared "Shame on Lippert Components, Inc., for Harboring Rat Contractors." The other banner read, "OSHA Found Safety Violations Against MacAllister Machinery, Inc." Two union representatives were posted next to the display at all times. The Union maintained the rat-and-banner display, along with its two attending representatives, for the 4 full days of the trade show, commencing approximately at 9:30 a.m. and lasting until about 5 p.m. each day. Attendees of the trade

[11] See also *Teamsters Local 25 v. NLRB*, 831 F.2d 1149, 1153 (1st Cir. 1987) (Sec. 8(b)(4)(ii)(B) is "pragmatic in its application, looking to the coercive nature of the conduct, not to the label which it bears."); accord *Pye v. Teamsters Local 122*, 61 F.3d 1013, 1024 (1st Cir. 1995) (Sec. 8(b)(4)(ii)(B) covers "varied forms of economic pressure," including union mass shopping at neutral retail stores.).

[12] National Labor Relations Act, Sec. 1.

[1] 356 NLRB 1290 (2011).

[2] 355 NLRB 797 (2010).

[3] Because I would find that the Union's conduct violated Sec. 8(b)(4)(ii)(B) of the Act, I find it unnecessary to pass on the complaint allegation that the conduct also violated Sec. 8(b)(4)(i)(B) of the Act.

show drove past the giant inflatable rat and two banners to park in the grassy field near the Hall of Fame. Lippert turned to the Board seeking relief from the Union's secondary pressure it endured at its key industry gathering.

II.

Section 8(b)(4)(ii)(B) provides, in pertinent part, that it shall be an unfair labor practice for a labor organization or its agents:

> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—
>
> (B) forcing or requiring any person to . . . cease doing business with any other person.

There is no dispute that the Union's rat-and-banner display with accompanying union posts had the proscribed secondary object of forcing neutral employer Lippert to cease doing business with MacAllister, with which the Union has a primary labor dispute. The question presented to the Board is whether the Union's conduct constitutes threat, coercion, or restraint under subsection (ii). My colleagues conclude that it does not. As explained below, I disagree.

The vice of coercive secondary conduct is clear. Congress enacted and later amended Section 8(b)(4) of the Act in full recognition that abuse by unions of conduct directed to pressure neutral employers causes substantial economic harm. Congress thus adopted the provisions of Section 8(b)(4) to shield unoffending neutral employers from secondary pressure intended to induce them to stop doing business with another employer with which a union has a primary dispute. See *NLRB v. Denver Building Trades Council*, supra, at 692. The Board long ago explained that "Congress thought that [secondary boycotts] were unmitigated evils and burdensome to commerce." *Carpenters (Wadsworth Building)*, 81 NLRB 802, 812 (1949), enfd. 184 F.2d 60 (10th Cir. 1950), cert. denied 341 U.S. 947 (1951) (cited with approval in *Electrical Workers v. NLRB,* 341 U.S. 694, 704 (1951)). Section 8(b)(4) was thus "drafted broadly to protect neutral parties, the helpless victims of quarrels that do not concern them at all. Despite criticism . . . that the secondary boycott provision was too sweeping, the Congress refused to narrow its scope. Recognizing that [i]llegal boycotts take many forms . . . Congress intended its prohibition to reach broadly." *International Longshoremen's Assn. v. Allied Inter., Inc.*, 456 U.S. 212, 225 (1982) (internal quotation marks and citations omitted). The goal is to protect employers, employees, and consumers from "coerced participation in industrial strife." *NLRB v. Retail Store Employees Local 1001 (Safeco),* 447 U.S 607, 617–618 (1980) (Blackmun, J., concurring in part).

In concluding that the rat and banner displays in *Brandon* and *Eliason & Knuth* were not coercive within the meaning of Section 8(b)(4)(ii)(B), supra,[4] the majorities in those cases did not claim that the Act compels their interpretation.[5] Rather, they only found it reasonable to construe Section 8(b)(4)(ii)(B) as not reaching the disputed displays—and even then over vigorous dissenting opinions.[6] Section 8(b)(4) of the Act does not define coercion, and thus its expanse falls squarely within the Board's responsibility to construe and apply the general terms of the Act.[7] It is therefore fully within the Board's authority to construe Section 8(b)(4)(ii)(B) to find that the displays at issue here constitute coercive picketing or, in the alternative, that the displays are coercive even if they do not constitute picketing. The Board should do so here.

The Board with court approval traditionally viewed the proscriptions against coercion in Section 8(b)(4) of the Act to include the posting of union agents at a neutral employer's premises regardless of whether the agents patrolled the site by ambulation or carried a formal picket sign on a stick. See *Laborers Local 389 (Calcon Construction)*, 287 NLRB 570, 573 (1987) (collecting cases). The common thread in these cases was a recognition that any particular movement by the posted union representatives was not the sine qua non of picketing. "In none of these definitions [of picketing] is the patrolling or the carrying of signs considered a requisite component part of picketing." Id., quoting *Mine Workers District 12 (Truax-*

[4] *Eliason & Knuth* held that a union's peaceful display of a large stationary banner at secondary employer locations does not threaten, coerce, or restrain a secondary employer within the meaning of Sec. 8(b)(4)(ii)(B). See 355 NLRB at 797. *Brandon* extended *Eliason & Knuth* to hold that a union's display of a large inflatable rat at the worksite of a secondary employer was not coercive and did not violate Sec. 8(b)(4)(ii)(B). See 356 NLRB at 1290.

[5] See *Eliason & Knuth*, 355 NLRB at 810 (framing the inquiry as only whether Sec. 8(b)(4)(ii)(B) "*necessarily* prohibit[s] the display" of a stationary banner)(emphasis in original); and at 797 ("Nothing in the language of the Act or its legislative history requires the Board to find a violation."); *Brandon*, supra, at 1294 (applying the analytical framework set forth in *Eliason & Knuth)*.

[6] See *Eliason & Knuth*, 355 NLRB at 811–821 (Members Shaumber and Hayes, dissenting); *Brandon*, 356 NLRB at 1294–1297 (Member Hayes, dissenting).

[7] See *NLRB v. Weingarten*, 420 U.S. 251, 266 (1975) ("[T]he Board has the special function of applying the general provisions of the Act to the complexities of industrial life . . . and its special competence in this field is the justification for the deference accorded its determination.") (Internal quotation marks and citations omitted.); *NLRB v. Denver Building & Construction Trades Council*, supra, 341 U.S. at 692 ("the Board's interpretation of [Sec. 8(b)(4)] of the Act and the Board's application of it in doubtful situations are entitled to weight").

Traer Coal), 177 NLRB 213, 218 (1969). Instead, the "important feature" of picketing is the "posting by a labor organization or by strikers of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business." *Lumber & Sawmill Workers Local 2797 (Stoltze Land & Lumber Co.),* 156 NLRB 388, 394 (1965).[8]

The Union's conduct here easily meets that standard. There can be little doubt that the Union's goal was to coercively deprive neutral Lippert of customers because of its business relationship with an employer, MacAllister, with whom the Union had a primary dispute. The Union's display of the large inflatable rat, alongside the two substantial banners, accompanied at all times by posted union representatives, and continuing on four full successive days, is not meaningfully distinguishable from patrolling with a picket line using signs affixed to the end of sticks. In both instances, the union sets up a confrontation by creating a line that is not to be crossed.[9] The union goal remains the same in each instance despite the varied means employed: to intimidate by conduct. It is coercive within the meaning of Section 8(b)(4)(ii)(B) because it creates "a confrontation in some form between union members and the employees, customers, or suppliers who are trying to enter the employer's premises."[10]

The Board's mechanistic approach in *Brandon* and *Eliason & Knuth* fails to recognize that coercion may take many forms. The Board majorities there improperly exalted form over substance to limit the definition of picketing to situations where the union patrols with placards. See *Lawrence Typographical Union 570 (Kansas Color Press),* 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1968). It is the Board's obligation to adapt the Act to changing industrial circumstances,[11] and that applies no less to evolving union secondary conduct than it does to changing employer practices.

The conspicuous rat-and-banner display here, with attendant union posts, is a far cry from the handbilling at issue in the Supreme Court's *DeBartolo* decision.[12] The Court there addressed whether Section 8(b)(4)(ii)(B) proscribed peacefully distributing handbills, entirely unaccompanied by any version of picketing, urging customers not to patronize a neutral employer. Id. at 570. The handbilling was deemed noncoercive because it depended entirely on the persuasive force of its boycott idea, unlike traditional picketing—or the disputed variant of it here—that depends on intimidation.[13] The Union's goal was to evoke a picket line—but evade the proscriptions of Section 8(b)(4)—by requiring people to pass their union sentries, banners, and giant inflatable rat in order to do business with the neutral employer Lippert. The rat in particular, a dominating physical presence, plainly created a symbolic confrontation. See *Eliason & Knuth*, supra, 355 NLRB at 815 (coercive conduct under Sec. 8(b)(4)(ii) creates a physical or symbolic confrontational barrier).[14] This is far more than "mere persuasion" that the Court found insufficient to prove a violation of Section 8(b)(4)(ii)(B). Rather, the very presence of a picket line—and its close variant used here—may induce action of one kind or another irrespective of the ideas disseminated,[15] and squarely explains why the Union did not limit its conduct to lawful peaceful handbilling.

In sum, neither the text of the Act nor *DeBartolo* precludes a finding that the conduct presented in this case is tantamount to picketing. Indeed, even after *DeBartolo*, the Board has found nonambulatory picketing unlawful, and explained that the important feature of picketing is the posting of individuals at entrances to a workplace.[16] This

[8] Courts have thus made clear that the terms "threaten, coerce or restrain" in Sec. 8(b)(4) "[do] not describe any sort of measurable physical conduct suggested by the ordinary meaning of those words, but [are] rather . . . term[s] of legislative art designed to capture certain types of boycotts deemed harmful by Congress." *Soft Drink Workers Local 812 v. NLRB*, 657 F.2d 1252, 1267 fn. 27 (D.C. Cir. 1980) (citing *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 US 58, 71 (1964)).

[9] Indeed, the imposing size of the inflatable rat and banners obviates the need for patrolling to create the confrontational barrier.

[10] *NLRB v. United Furniture Workers,* 337 F.2d 936, 940 (2d. Cir.1964).

[11] *NLRB v. Weingarten*, supra, 420 U.S. at 266.

[12] *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988).

[13] See *DeBartolo* at 578 ("more than mere persuasion is necessary to prove a violation of § 8(b)(4)(ii)(B)"). See also *NLRB v. Retail Store Employees Local 1001 (Safeco)*, supra, 447 U.S. at 619 (Stevens, J., concurring in part) (reasoning that picketing, unlike handbilling, is "a mixture of conduct and communication" and that the conduct element "often provides the most persuasive deterrent"). The Court in *DeBartolo* cited Justice Stevens' concurrence with approval. See 485 U.S. at 580.

[14] It is of course the very purpose of a trade show to increase business, and Lippert conducted business of nearly a billion dollars annually with the trade show's host, Thor Industries. The Union's selection of the trade show as the location for its secondary conduct is redolent with economic retaliation, lending further support to a finding of coercion under Sec. 8(b)(4). See *Kentucky District Council (Wehr Constructors),* 308 NLRB 1129, 1130 fn. 2 (1992) (internal quotation omitted) (Sec. 8(b)(4) proscription "broadly includes nonjudicial acts of a compelling or restraining nature . . . consisting of a strike, picketing, or other economic retaliation or pressure in the background of a labor dispute").

[15] See *Safeco*, supra, at 619 (Stevens, J., concurring in part).

[16] See, e.g., *Mine Workers District 2 (Jeddo Coal Co.)*, 334 NLRB 677, 686 (2001) ("[N]either patrolling alone nor patrolling combined with the carrying of placards are essential elements to a finding of picketing; rather, the essential feature of picketing is the posting of individuals at entrances to a place of work."); *Service Employees Local 87 (Trinity Maintenance),* 312 NLRB 715, 743 (1993) (same), enfd. mem. 103 F.3d 139 (9th Cir. 1996).

is consistent with the Board's longstanding broad and flexible view of picketing detailed above.[17] The Board's restrictive approach in *Brandon* and *Eliason & Knuth* to Section 8(b)(4)(ii)(B) of the Act fails to apply our administrative experience to recognize, and distinguish among, the continuum of union behavior from permissible handbilling to proscribed coercive picketing in its many forms.

Further, the Union's display here is properly deemed coercive even if viewed as nonpicketing conduct. The Board traditionally has found with court approval that nonpicketing activity directed against secondary employers may constitute unlawful coercion.[18] The Board nevertheless in *Brandon* and *Eliason & Knuth* doubled down on its unduly restrictive approach to Section 8(b)(4)(ii)(B) by articulating and applying a new, extremely limited test for analyzing whether union secondary nonpicketing activity is unlawful: they will find coercive conduct "*only* when the [union] conduct directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations."[19] The term disruption, of course, appears nowhere in the statutory text, which instead requires only that the union misconduct "threaten, coerce, or restrain." The *Eliason* majority cited cases involving disruptive conduct that was, unsurprisingly, found to be coercive.[20] But nothing in those decisions *requires* disruption in order to find coercion.[21] Even the majority in *Brandon* conceded that "[i]t may be that the size of a symbolic display combined with its location and threatening or frightening features could render it coercive within the meaning of Section 8(b)(4)(ii)." 356 NLRB at 1294. The Board precedent the majority affirms today, however, simply fails to reckon with the wide range of union secondary nonpicketing conduct falling between the plainly extreme and the de minimis. This failing incentivizes unions to exploit the gaping secondary hole left open by today's majority opinion. This is cold comfort for neutral employers like Lippert.

III.

The application of Section 8(b)(4)(ii)(B) to the Union's activity here will not infringe on its First Amendment rights. The Supreme Court has "consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment." *International Longshoremen's Assn. v. Allied Inter., Inc.*, supra, 456 U.S. at 226. This principle was not disturbed by the *DeBartolo* Court, and it governs this case because the Union's conduct is the functional equivalent of picketing.

To be sure, the Board must be sensitive to First Amendment considerations in construing the Act. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 741 (1983). Picketing, including the rat-and-banner variation here, typically involves a certain admixture of conduct and communication.[22] But where the former predominates—as here—with confrontational heft, the weight to be accorded the speech values is diminished and, as the Court has made clear, may give way entirely.[23] "Secondary boycotts and picketing by labor unions may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982), quoting *NLRB v. Retail Store Employees Local 1001 (Safeco),* supra, at 617–618 (Blackmun, J., concurring in part). The Supreme Court's caution in *DeBartolo* to avoid NLRA interpretation that raises serious constitutional questions under the First Amendment is certainly part of the Board's application of that calculus. But it is not license to eschew the Board's statutory obligation to prevent coercive secondary conduct, and certainly not where the confrontational conduct outweighs the speech element.[24] The Board should fulfill that obligation robustly, subject, as in all cases, to court review.[25]

[17] See *NLRB v. Fruit & Vegetable Packers Local 760*, supra, 377 U.S. at 76 (Black, J., concurring) (picketing under Sec. 8(b)(4)(ii)(B) includes the concept of "patrolling, that is, *standing* or marching back and forth or round and round on the streets, sidewalks, private property, or elsewhere, generally adjacent to someone else's premises[.]") (Emphasis added.)

[18] See *Eliason & Knuth*, supra, 355 NLRB at 806 and fn. 29 (collecting cases).

[19] *Eliason & Knuth*, supra, 355 NLRB at 805 (emphasis supplied). See also *Brandon*, supra, 356 NLRB at 1292.

[20] See, e.g., *Carpenters (Society Hill Towers Owners' Assn.),* 335 NLRB 814, 820–823 (2001) (unintelligible union message broadcasted at excessive volume on numerous dates), enfd. mem. 50 Fed. Appx. 88 (3d. Cir. 2002); *Service Employees Local 525 (General Maintenance Co.),* 329 NLRB 638 664–665, 680 (1999) (hurling filled trash bags into a building's lobby).

[21] See *Soft Drink Workers Local 812 v. NLRB*, supra, 657 F.2d at 1267 (Sec. 8(b)(4)(ii)(B) violations do not require empirical proof that the neutrals lost business).

[22] See *NLRB v. Retail Store Employees Local 1001 (Safeco)*, supra, 447 U.S. at 619 (Stevens, J., concurring in part).

[23] This is no less true for coercive nonpicketing conduct than for coercive picketing activity.

[24] See *International Longshoremen's Assn. v. Allied Inter., Inc.*, supra, 456 U.S. at 226 (conduct designed not to communicate but to coerce merits less consideration under the First Amendment).

[25] See *NLRB v. Truck Drivers*, 353 U.S. 87, 96 (1957) ("The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.").

IV.

A plurality of the Board is in full agreement that the interpretation of Section 8(b)(4) of the Act in *Brandon* and *Eliason & Knuth* is improperly narrow, and may be Constitutionally broadened.[26] My disagreement with my colleagues' concurring opinions is primarily on the significance we ascribe to the facts. This case is not analogous to driving by a roadside billboard or reading a handbill. That discounts the Charging Party's key business location implicated here, the hard-to-miss giant inflatable rat, and the posted union representatives, all in a slow-speed grassy parking area, for four days' duration. The Board must evaluate these facts "flexibly and sensibly . . . to protect neutrals from a broad range of secondary activity."[27]

Although this case may not be as extreme as the examples of unlawful activity cited by my colleagues, it does not follow that the conduct here must be lawful. Cases involving egregious coercive conduct clearly falling within the proscription of Section 8(b)(4) of the Act shed little light on determining Constitutional parameters in rat-and-banner cases.[28] The absence of such conduct here—like aggression or a gauntlet of shouting individuals to pass – is hardly dispositive of this case. Instead, the Board should pragmatically look to whether the conduct at issue is coercive in nature, and I find coercion here far exceeding mere persuasion. The *DeBartolo* framework for safeguarding potential infringement of a union's First Amendment rights does not forbid the Board from finding a violation of Section 8(b)(4)(ii)(B) of the Act when the expression at issue is predominated by coercion and intimidation.

V.

My colleagues, by affirming *Brandon* and *Eliason & Knuth,* ensure that displays of banners and giant, inflatable rats directed at neutral employers will be deemed lawful, including in this case. Such coercive secondary conduct will predictably proliferate, but today's decision leaves targeted neutral employers without recourse. Such a result cannot be squared with the Board's obligation to defuse and channel industrial strife toward legitimate conduct under the Act.

Board Members Schaumber and Hayes, who vigorously dissented in *Eliason & Knuth*, aptly predicted that the Board's approach in this area "substantially augments union power, upsets the balance Congress sought to achieve, and, at a time of enormous economic distress and uncertainty, invites a dramatic increase in secondary boycott activity." 355 NLRB at 812. This prediction is no less true today than when made a decade ago. Aggrieved neutral employers will continue to petition the Board seeking relief from secondary coercion. The Board's response today is to state, in effect, "too bad."

For the foregoing reasons, I dissent.

Dated, Washington, D.C. July 21, 2021

William J. Emanuel, Member

NATIONAL LABOR RELATIONS BOARD

Raifael Williams and *Tiffany Limbach, Esqs.,* for the General Counsel.

Charles R. Kiser, Esq. (International Union of Operating Engineers, Local 150), for the Respondent.

Allyson Werntz, Brian Easley, and *Elizabeth Bentley, Esqs. (Jones Day),* for the Charging Party.

DECISION

STATEMENT OF THE CASE

KIMBERLY R. SORG-GRAVES, Administrative Law Judge. On October 1, 2018, Lippert Components, Inc. (Lippert) filed Case 25–CC–228342 with Region 25 (Region) of the National Labor Relations Board (Board) alleging that the International Union of Operating Engineers, Local Union No. 150, A/W International Union of Operating Engineers, AFL–CIO (Respondent or Local 150) posted a large, inflatable rat and two stationary banners near the public entrance of a trade show, inducing or encouraging persons engaged in commerce to refuse to handle or work on goods or perform services and has threatened, coerced or restrained Lippert and other persons engaged in commerce in violation of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (Act). On December 31, 2018, the Region issued the complaint in this matter. (GC Exh. 1(a) and 1(c)).[1]

[26] To the extent Chairman McFerran deems *Brandon* and *Eliason & Knuth* as setting forth an immutable Constitutional line, I respectfully disagree.

[27] 355 NLRB at 814 (Members Schaumber and Hayes, dissenting).

[28] The relative weight of coercion and expression is clearly established in these cases. See *Electrical Workers* Local 98, 370 NLRB No. 51 (2020) (audio broadcast including crying baby sounds played repeatedly at high volume by union over a month-long period and in violation of municipal noise regulations); *Carpenters (Society Hill Towers Owners' Assn.),* supra, 335 NLRB 814, 820–823 (excessive volume on numerous days).

[1] Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh." for the General Counsel's exhibits, "GC Brief" for General Counsel's posthearing brief, "R. Exh." for Respondent's exhibits, and "R. Brief" for Respondent's posthearing brief. Specific citations to the transcript and exhibits are included where appropriate to aid review and are not necessarily exclusive or exhaustive. My findings and conclusions are not based solely on the record citations contained in this decision, but rather are based upon my consideration of the entire record for this case.

I heard this matter on May 14, 2019, in South Bend, Indiana, and I afforded all parties a full opportunity to appear, introduce evidence, examine and cross-examine witnesses, and argue orally on the record. The General Counsel, the Respondent, and the Charging Party filed post-trial briefs in support of their positions.

After carefully considering the entire record, including my observation of the demeanor of the witness[2] and the parties' briefs, I find that the Respondent did not violate the Act by placing stationary inflatable rat and banners outside the trade show for 4 days as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Charging Party, Lippert, is a corporation with an office and a place of business in Elkhart, Indiana where it engages in the manufacture and nonretail sale of components used in the recreational vehicle (RV), manufactured housing, and related industries. In conducting its operations during the calendar year prior to the issuance of the complaint, Lippert purchased and received goods valued in excess of $50,000 directly from points outside the State of Indiana. The parties stipulate, and I find, that Lippert has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(c) and 1(g); Tr. 9).

Respondent admits, and I find, that Local 150 is a labor organization within the meaning of Section 2(5) of the Act. (GC Exh. 1(h) and 1(j)). Based on the foregoing, I find that this dispute affects commerce, and the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

All parties agree that the Respondent has been involved in a labor dispute with MacAllister Machinery, Inc. (MacAllister) (GC Exh. 1(j)); however, the parties dispute whether the Respondent has engaged in a labor dispute with either Lippert or Thor Industries (Thor). Lippert supplies RV components to the mobile home and marine industries. (Tr. 17.) Lippert rents some of its equipment from MacAllister. (Tr. 18.) Thor is one of Lippert's largest customers and purchases approximately $800 million worth of goods yearly from Lippert. (Tr. 1.9.

Thor hosted its annual RV tradeshow in Elkhart, Indiana from around September 24, 2018, through September 27, 2018,[3] at various locations around the city. The tradeshow provides a platform for approximately eight to ten RV suppliers to show their products, primarily to other dealers. (Tr. 18.) Lippert and Thor showed their products and services at the RV Hall of Fame at 21565 Executive Parkway in Elkhart, Indiana and the trade show spanned the grassy area on either side of the Hall of Fame. (Tr. 19–20.)

B. Events of September 24 through 27

The parties stipulated that on September 24 through the 27, unknown agents of the Respondent posted an inflatable rat approximately 12 feet in height with red eyes, fangs, and claws near the public entrance to the Thor's RV trade show. (GC Exh. 1(j), 2, 3; Tr. 10, 31–32.) The parties also stipulated that on the above dates the Respondent placed two stationary banners, each approximately 96 inches (8 feet) long and 45 inches (3.75 feet) high next to the inflatable rat. (Tr. 10–11). One banner was bright orange and read, "OSHA Found Safety Violations Against MacAllister Machinery, Inc.," (GC Exh. 2; Tr. 10) and the other was white and read, "SHAME ON LIPPERT COMPONENTS, INC., FOR HARBORING RAT CONTRACTORS." (GC Exh. 3; Tr. 10–11.) The Respondent admits that the two individuals employed by Local 150 sat next to the rat and banners on the 4 days at issue; neither party presented any evidence that the two individuals marched, patrolled, or carried or displayed picket signs. (GC Exh. 1(j); Tr. 32.)

The Respondent set up the inflatable rat and two banners sometime around 9:30 or 10:00 am and took them down before 5 p.m. each day. (Tr. 25–27.) The display was set up at the intersection of Executive Parkway (east-west) and County Road 17 (north-south) close to the curb with the two banners facing south toward Executive Parkway. (Tr. 33–35.) The RV trade show encompassed both sides of Executive Parkway. Attendees of the RV trade show had to drive past the inflatable rat and two banners to park in a grassy field near the RV Hall of Fame. (Tr. 36.)

The testimony indicates that the Respondent only had a labor dispute with MacAllister. Dean Leazenby, former in-house counsel for Lippert, testified that the Respondent and Lippert have not had discussions regarding employee conditions. (Tr. 28.) He also testified that the Respondent never attempted to organize Lippert's employees, nor has it ever represented any employees at Lippert. (Tr. 28). Mr. Leazenby reports that no Lippert or MacAllister representatives were present at the RV show on any day. (Tr. 27.) Lippert does not employ any union employees, and neither party presented evidence that Thor employs any union members.

On the morning of September 24, Lippert's chief of human resources, Nick Fletcher, called Mr. Leazenby into his office due to a "situation at the RV Hall of Fame." (Tr. 20–21.) Fletcher indicated that "these signs and the rat were somewhat embarrassing to Thor and embarrassing to Lippert Components." (Tr. 20–21.) Leazenby drove down to the RV show to take pictures of the demonstration; subsequently, he checked on the display each of the days in question. Leazenby testified that he saw the Respondent's use of the inflatable rat as a way to draw attention to the messages on the banners and in his opinion the inflatable rat was "quite menacing in its appearance" and was "intended to be scary." (Tr. 32.) He attempted to contact counsel for Respondent to discuss the display but could not contact Kiser. Other than the phone calls during the RV show, Leazenby and Lippert have not contacted the Respondent regarding its employees or working

[2] General Counsel called one witness and Charging Party did not call any additional witness. Respondent cross-examined the witness called by General Counsel but declined to call its own witnesses. I find no reason to discredit the testimony of the sole witness.

[3] Unless otherwise noted, all dates refer to 2018.

conditions.

Analysis

A. Overview of the Law

In 1988, the Supreme Court held that peaceful handbilling outside mall stores urging customers not to patronize the establishments did not violate the Act. *DeBartolo Corp. v. Florida Gulf Coast Bldg.*, 485 U.S. 568 (1988). The Court cited *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964) (*Tree Fruits*), for the proposition that Congress did not intend, in Section 8(b)(4)(B), to proscribe all peaceful consumer picketing at secondary sites. Id. at 578. The union in *DeBartolo* had a primary dispute with a construction company for allegedly paying substandard wages and fringe benefits. DeBartolo, a mall owner, contracted with the construction company to build a department store in the mall. Id. at 570–571. In response, union members handed out fliers at all four entrances to the mall informing the public of the dispute and seeking to use publicity to pressure DeBartolo to hire companies that pay fair wages. Id. The Court ultimately found that "more than mere persuasion is necessary to prove a violation of § 8(b)(4)(ii)(B)" and that "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." Id. at 578 and 580. In *DeBartolo*, the union did not have picket signs nor did the union members patrol. The Court found that this was not tantamount to picketing and ultimately found that peaceful handbilling of a secondary employer is protected by the First Amendment and not proscribed by Section 8(b)(4) of the Act. Id. at 571.

In 2010, the Board extended the reasoning in *DeBartolo* finding that stationary banners, like handbilling, are noncoercive conduct and are not a violation of § 8(b)(4)(ii)(B). *Eliason & Knuth of Arizona, Inc.*, 355 NLRB 797 (2010). In *Eliason*, the union placed banners, approximately 3 to 4 feet high and 15 to 20 feet long, on the public sidewalk outside the secondary employer's facility approximately 15 to 1,050 feet from the entrances. Id. at 798. One banner read "SHAME ON [secondary employer]" and "Labor Dispute" while the other read "DON'T EAT 'RA' SUSHI". Id. Several union representatives stood beside each of the stationary banners and offered flyers to passersby. Id. The Board found that the use of stationary banners did not by itself establish signal picketing. Id. at 805. The Board further concluded that this nonpicketing conduct was not a violation of § 8(b)(4) because the conduct did not engender the same coercive effects of picketing nor did it disrupt the secondary's operations. Id. at 805–806. Finally, the Board affirmed the notion that banners are speech and, "neither the character nor the size of the banners stripped them of their status as speech or expression." Id. at 809.

In 2011, the Board further extended the law and held that displaying a large inflatable rat outside the workplace of a secondary employer is not a violation of the Act. *Brandon Regional Medical Center* (*Brandon II)*, 356 NLRB 1290 (2011). In *Brandon II*, a medical facility hired two construction contractors to build an addition to the hospital; however, the two contractors were engaged in a labor dispute with the union regarding use of nonunion labor and insufficient wages. Id. at 1290. In addition to stationing a union member holding out a leaflet between two outstretched arms aimed at the incoming and outgoing traffic at the hospital's entrance, the union placed an inflated rat balloon on a flatbed trailer parked outside the hospital, approximately 100 feet from the front door. Id. The inflatable rat was approximately 16 feet tall and 12 feet wide with an attached sign reading "WTS". Id. (WTS stood for "Workers Temporary Staffing," one of the primary contractors). The Board affirmed past doctrine and "found no evidence here to support a finding that the display of the inflatable rat. . . constituted nonpicketing conduct that was unlawfully coercive." Id. at 1292.

B. Which Employers were Primary and Secondary to the Labor Dispute?

Section 8(b)(4)(ii)(B) of the Act states that "it is an unfair labor practice for a labor organization or its agents. . . to threaten, coerce, or restraint a person engaged in commerce. . . ." 29 U.S.C. § 158(b)(4)(ii)(B). In applying this provision, the Board and courts have determined that only certain types of boycotts and picketing are prohibited by the provision of the Act depending on the status of the employer. A primary employer is one directly involved in a labor dispute with a union and a secondary employer is one involved with the primary employer but who has no direct involvement with any labor dispute with the union. Thus, a preliminary determination must be made as to whether the disputed conduct was directed at a primary or secondary employer. *NLRB v. Local 825, Intern. Union of Operating Engineers, AFL–CIO*, 400 U.S. 297, 302–304 (1971); see also *Electrical Workers IBEW Local 2208 (Simplex Wire)*, 285 NLRB 834 (1987) ("If [the employer] is a neutral, then the picketing had a secondary object of coercing [secondary employer] to pressure [primary employer] to resolve its labor dispute, to which [secondary employer] was not a party.").

The complaint alleges that the Respondent has a labor dispute with MacAllister, but not with Lippert or Thor. In its answer, the Respondent admitted that it has a primary dispute with MacAllister but argued that it also has labor disputes with Lippert and Thor. The Respondent argues that a primary labor dispute exists between Local 150 and Lippert and Thor because 29 U.S.C. §152(9) specifies that the disputants do not need to stand in proximate relation as employer and employee. (R. Brief at p. 16.) The General Counsel disagrees and argues that no primary dispute exists between Respondent and Lippert or Thor because Local 150 has never represented any of its employees or even discussed their terms and conditions of employment. (GC Br. at pp. 18–19.)

Section 2(9) of the Act provides a definition of a labor dispute which includes "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 29 USC § 152(9). Read in its entirety, the definition states that the relation of employer and employee is not determinative or required for a primary labor dispute to exist; however, it requires that a controversy exists regarding terms and conditions of employment. The Respondent

argues that this definition allows it to establish a primary dispute between itself and Lippert and Thor; this is incorrect. Although the statute specifies that proximate relation is not required, the Respondent has not shown that a controversy exists between itself and Lippert or Thor involving terms or conditions of employment. I find no record evidence that the labor dispute between the Respondent and MacAllister has in anyway affected the terms and conditions of employees working for or at Lippert or Thor.

Here, the Respondent has a direct labor dispute with MacAllister; however, no evidence has been presented that there was a further direct dispute with either Lippert or Thor. Lippert rents machinery from MacAllister but does not employ any of its employees. Thor purchases component parts from Lippert but does not employ any of MacAllister's employees. Therefore, MacAllister is the primary employer engaged in a primary labor dispute with Respondent. Both Lippert and Thor are secondary employers, and thus, Respondent has a secondary dispute with those companies.

C. Did the Banners and Inflatable Rat Constitute Proscribed Picketing in Violation of Section 8(b)(4)(ii)*?*

As described above the Supreme Court has determined that "more than mere persuasion is necessary to prove a violation of §8(b)(4)(ii)(B): that section requires a showing of threats, coercion or restraints." *DeBartolo*, supra at 578. The law is also clear that handbilling without picketing is not coercive and any loss of business "is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do." *DeBartolo*, supra at 580. In its *Eliason & Knuth* decision, the Board determined that the banners are protected speech and are not tantamount to picketing because "picketing generally involves persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite. . . creating a physical, or at least, symbolic confrontation." Supra, at 802. A stationary banner, unlike a picket sign, does not create any form of confrontation and members of the public can simply "avert [their] eyes." Id. at 803 (citing *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1214 (9th Cir. 2005)).

Here, the Respondent placed two stationary banners on a public street corner outside an RV trade show. Like the banners in *Eliason & Knuth*, the banners informed the public of a dispute and in no way caused a confrontation so as to create a prohibited picketing situation. *Eliason & Knuth*, supra at 789. The banners here, approximately 3.75 feet high by 8 feet long, are significantly smaller than the banners in the other three cases where the Board found the banners not to be symbolic barriers or confrontational. *Eliason & Knuth*, supra at 789 (banners were 3–4 feet high and 15–20 feet long); *New Star*, supra at 624 (banners were 4 feet high and 20 feet long); *Westgate Las Vegas*, 363 NLRB 1633, 1634 (2016) (banners were 4 feet high and 20 feet long). Further, the two employees who monitored the banners did not march or carry picket signs; they merely sat beside the display. I find that here, as in *Eliason & Knuth*, the usage of stationary banners does not constitute proscribed picketing.

As discussed above in *Brandon II*, the Board held that an inflatable rat as used in that demonstration did not constitute picketing because it "lacked the essential 'element of confrontation that has long been central to our conception of picketing for the purposes of the Act's prohibitions.'" *Brandon II*, supra at 1291 (citing *Eliason & Knuth*, supra at 802). The rat in *Brandon II* was approximately 16 feet tall and 12 feet wide, erected on a trailer bed, and was stationary while being displayed; whereas here, the rat in the instant case was 12 feet tall and stationed on the curb. While the leaflet displayed along with the inflatable rat in *Brandon II* was considerably smaller than the banners in this case, the similarities between the use of the inflatable rat in that display and the display at issue here leads me to find that the precedent set in *Brandon II* is controlling in this case. Accordingly, I find that Respondent's display of the inflatable rat with the banners is not proscribed picketing.

D. Was the Conduct Otherwise Unlawfully Coercive in Violation of Section 8(b)(4)(ii)*?*

The General Counsel argues that, even if Respondent's conduct was not picketing, it still should be considered unlawfully coercive tactics because the timing and location of the display enmeshed Lippert and Thor into the dispute between Respondent and MacAllister. (GC Br. at 25). The General Counsel argues that this was not innocent publicity and Lippert had to call its Director of Legal Affairs to investigate and contact the Respondent regarding this display.

In *DeBartolo*, the Court confirmed that the distinction between protected handbilling or other protected speech such as bannering and conduct prohibited by Section 8(b)(4)(ii)(B) is whether the activity is trying to coerce or intimidate; the product of the activity cannot be simple persuasion. *DeBartolo*, supra at 578; see also *Brandon II*, supra at 1291 ("The Board stated that the determinative question as to whether union activity at a secondary site violates Section 8(b)(4)(ii)(B) is whether it constitutes 'intimidation or persuasion'"). In situations involving nonpicketing, the Board has found "conduct to be coercive only when the conduct directly caused or could reasonably be expected to directly cause, disruption of the secondary's operations." *Eliason & Knuth*, supra at 805; see *Brandon II*, supra at 1291–1293 (finding a rat display was not coercive because "nothing in the location, size or features of the balloon that were likely to frighten those entering the hospital, disturb patients or their families, or otherwise interfere with the business of the hospital. . ." was proscribed by the Act).

No evidence has been presented that the displays outside the RV Hall of Fame deterred patrons from entering the RV show. Further, no evidence has been presented that the RV show itself could not conduct its business or that the conduct could reasonably have been expected to cause a disruption of the operations. The Director of Legal Affairs was called to investigate and testified that this display was "embarrassing" to Lippert and Thor. The General Counsel provides no law showing that a displayed messaged causing embarrassment to a company or its executives is equivalent to coercive conduct that is reasonably expected to prevent patrons and employees from attending or working thereby coercively blocking the secondary's flow of commerce which the provision of the Act was intended to proscribe. Notably, there is no evidence that the banners and inflatable rat or the two individuals attending the rat caused any disruption (i.e., no physical barrier to impede others, no stopped traffic, no

patrolling, no loud disruptive noises or actions, no approaching the patrons or employees, no refusal by patrons to attend or employees to work, etc.)

The General Counsel contends that the appearance of a 10 to 12-foot rat with red eyes and claws is intended to frighten and prevent persons from entering the premises. Notwithstanding, Mr. Leazenby's subjective descriptions of the rat as "quite menacing in its appearance" and "intended to be scary," the Board has affirmed cases involving similar looking inflatable rats and found they were not likely to frighten, disturb, or prevent business from occurring. *Brandon II*, supra at 1292; see also *Eliason & Knuth,* supra at 803 quoting, *Sheet Metal Workers Local 15 v. NLRB(Brandon Medical Center),* 491 F.3d 429, 438 (D.C. Cir. 2007) (finding a mock funeral with four people carrying a casket accompanied by a Grim Reaper character "was not the functional equivalent of picketing as a means of persuasion because it had none of the coercive character of picketing"). The Board in *Eliason & Knuth* also found "that the peaceful, stationary holding of banners announcing a 'labor dispute' fell far short of 'threatening, coercing, or restraining' the secondary employer." Supra at 806.

The General Counsel also alluded to the fact that the display blocked the entrance to the RV show. The Board has determined that, subject to other restrictions, when the display is on a public sidewalk but not blocking the way for pedestrians or creating confrontations, there is no other violation. *Westgate Las Vegas*, supra at 4; see *Eliason & Knuth*, supra at 798 (no violation for banners within 15 and 1,050 feet of the entrance); see also *Brandon II*, supra at 1291 (no violation for banners within 100 feet of the entrance).

The record contains no evidence that the inflatable rat and two banners blocked the entrance of the RV show. The display was on public land bordering the road and did not block any ingress and egress into the show. Those attending the show drove past the rat and banners to park further down the road where the open fields were used as parking lots. The fact that the inflated rat likely caused those going to and leaving the RV show to notice and, if they chose, to read the banners does not make the display coercive. The evidence demonstrates the display was "close to the curb" but does not state the distance from the display to where patrons were exiting the road to park in the field. Given past decisions showing that a banner is not coercive when as close as 15 feet to the entrance or partially blocking a sidewalk, there is insufficient evidence to establish a violation based on the location of the display in this case. See *Eliason & Knuth*, supra at 798 (no violation for banners within 15 and 1,050 feet of the entrance); see also *Brandon II*, supra at 1291 (no violation for banners within 100 feet of the entrance).

Due to the stationary, passive nature, and the speech component of the banners and inflatable rat, I find no coercive action taken here which would have caused a disruption of the RV show or otherwise coerced or intimidated patrons or employees.

E. Were the Banners and Inflatable Rat Signal Picketing in Violation of Section 8(b)(4)(i)(B)*?*

The General Counsel alleges a violation of Section 8(b)(4)(i)(B) for "signal picketing," suggesting that Respondent was attempting to send a signal to Lippert and Thor employees to cease work. The General Counsel cites *Electrical Workers, Local 98*, 327 NLRB 593 (1999), where the Board concluded that a union agent standing outside a neutral site holding a sign claiming the primary employer did not pay appropriate wages was unlawful signal picketing. The General Counsel suggests that the union attempted to persuade neutral employees to cease work due to the location of the display; by placing the rat and signs at the entrance, all employees and patrons were required to pass the display.

Signal picketing is "'activity short of a true picket line, which acts as a signal that sympathetic action' should be taken by unionized employees of the secondary or its business partners." *Eliason & Knuth*, supra at 804–805 (citing *Electrical Workers Local 98* (*Telephone Man*), 327 NLRB 593 fn. 3 (1999) (finding that a union representative standing at the primary gate with a sign revealing a message to the primary employer constituted signal picketing). This type of picketing is generally directed at other union employees or nonunion employees of the secondary employer and suggests that they too cease work. Id. at 805. In proving a violation of 8(b)(4)(i), "the evidence must prove that the alleged conduct 'would reasonably be understood by the employees as a signal or request to engage in work stoppage against their own employer.'" *Carpenters Southwest Regional Council Locals 184 & 1498* (*New Star)*, 356 NLRB 613, 616 (2011) (finding that banner displays using the words "labor dispute" was not a signal to employees to cease work). The evidence must also prove that the object of conduct is to compel the secondary employer to cease doing business with the primary employer. "Unless both of those elements are demonstrated, no violation of the Act may be found." Id. at 615

The evidence demonstrates that Lippert employees are not union employees and there is no evidence presented which indicates that Thor employees are union members. (Tr. 27–28.) In *New Star*, the Board held that "[a]ctivity intended only to educate consumers, secondary employers, or secondary employees, and even prompt them to action – so long as the action is not a cessation of work by the secondary employees – is lawful." *New Star*, supra at 615. A key aspect of an 8(b)(4)(i)(B) violation is that the secondary employees understand the signal; this means they were informed of the signal and thereafter obeyed the signal. As stated in *New Star*, this does not mean the union's banners prompted action, but rather the signal informed employees to cease work. Id. at 615 (Finding a need to show extrinsic evidence of "any prearranged or generally understood signal by union representative to employees of the secondary employers or any other employees to cease work.").

The General Counsel has not presented sufficient evidence to show that the two employees or the display itself were attempting to communicate to employees of either Lippert or Thor that they should cease their work. The banners first stated that safety violations had been found and second, announced shame on Lippert for using MacAllister a "rat contractor." Neither of these statements suggests or alludes to the fact that employees should cease their work. The Board noted in *Eliason & Knuth*, that in the 11 cases that the Board decided involving "89 banner displays at diverse locations ranging from restaurants to construction sites, no evidence has been offered that *any* employee responded to any banner by ceasing work." Supra at 418. Again,

in this case, there is no evidence that any employee, unionized or not, ceased working. If Respondent was trying to signal the secondary employees to cease working, I would think that they would have found a more fruitful signal in the intervening 7 years between the *Eliason & Knuth* decision and the displays at issue in this case. Even if there had been evidence that some employees ceased working after viewing the display, this alone would not establish a violation of the Act because the evidence does not support a finding that the secondary employees received a "signal" from Respondent to stop working, as opposed to merely have chosen to act on their own based upon the information provided.

Accordingly, I find that General Counsel has failed to meet its burden to prove that Respondent signaled to the employees of a secondary to cease work and that the object of this conduct was to compel the secondary to stop doing business with the primary, and therefore, I find insufficient evidence of a violation of Section 8(b)(4)(i)(B).

F. Was the Conduct Protected by the First Amendment?

Cases involving inflatable objects and banners have raised First Amendment concerns in the past. In *Eliason & Knuth*, the Board confirmed that "banners plainly constituted actual speech, or at the very least symbolic or expressive conduct" and are therefore protected speech under the First Amendment. Supra at 808. Further, the courts have instructed the Board to "avoid, if possible, construing the statutory phrase 'threaten, coerce or restrain' in a manner that would raise serious problems under the First Amendment." *Brandon II*, supra at 1293; *Eliason & Knuth*, supra at 807–808. In keeping with the constitutional avoidance doctrine, the Board has affirmed that the use of an inflatable rat is considered protected speech, so long as it does not violate any provisions of the Act. *Brandon II*, supra at 1293.

In asserting that the conduct at issue is not protected speech, the General Counsel relies on commercial speech precedent in *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council*, which states that "[t]he speech of labor disputants, of course, is subject to a number of restrictions." 425 U.S. 748, 763 fn. 17 (1976). The General Counsel omits from their argument the remainder of the footnote reading, "[t]he constitutionality of restrictions upon speech in the special context of labor disputes is not before us here. We express no views on that complex subject. . . ." Id. The General Counsel also relies on a Tenth Circuit case which found that "[t]he promulgation and circulation of a blacklist and the picketing of premises as the means of waging a secondary boycott which has the effect of substantially burdening or obstructing interstate commerce is not protected by the First Amendment." *United Brotherhood of Carpenters and Joiners of America v. Sperry*, 170 F.2d 863, 869 (10th Cir. 1948). The General Counsel argues that this case stands for the idea that no constitutional barrier exists to prohibitions on secondary boycotts. As well as the circuit court's decision being dated, I am bound to apply Board and not circuit court precedent.[4]

The Supreme Court considered whether the handbill message in *DeBartolo* was commercial speech and thereby entitled to a lesser degree of constitutional protection but found that regardless of its categorizing as commercial or noncommercial speech it was protected by the First Amendment. The Court noted that:

> handbills involved here, however, do not appear to be typical commercial speech such as advertising the price of a product or arguing its merits, for they pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace. Of course, commercial speech itself is protected by the First Amendment, *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762, 96 S.Ct. 1817, 1826, 48 L.Ed.2d 346 (1976), and however these handbills are to be classified, the Court of Appeals was plainly correct in holding that the Board's construction would require deciding serious constitutional issues. Supra at. 576.

Similar to the handbills in *DeBartolo*, the banners in this case provided the public with knowledge about possible dangers of an OSHA violation at MacAllister and MacAllister's interaction with Lippert, which is distinguishable from typical commercial speech. I find no compelling argument that the message in this case requires less First Amendment protection than the handbill language in *DeBartolo*.

In *Eliason & Knuth*, the banners read "SHAME ON [secondary employer]" and "DON'T EAT 'RA' SUSHI". Supra at 798. Here, one of the banners also used the phrase, "shame on" to communicate the union's frustration with "rat contractors." Like *Eliason & Knuth*, the use of "shame" is not a violation of First Amendment principles; furthermore, the banner here stated why "shame" was appropriate (i.e. "for harboring rat contractors") who have been cited for OSHA violations. In comparison to the banners in Eliason *& Knuth*, the banners here communicate more information to the public regarding the underlying issue rather than simply stating that a dispute exists. Thus, there is a stronger argument in this case that the banners convey protected speech.

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.

[4] I note that if federal court precedent was controlling, the bulk of the recent precedent would be in Respondent's favor. *Construction and General Laborers' Union No. 330 v. Town of Grand Chute*, 915 F.3d 1120, 1123 (7th Cir. 2019) ("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"); *King v. Construction & General Building Laborers' Local 79*, Docket No. 1:19-cv-03496 (2019 WL 2743839) (E.D.N.Y. Jun 13, 2019) (Denying temporary restraining order and preliminary injunction requesting cessation of picketing and removal of inflatable creatures); *Tucker v. City of Fairfield*, 398 F.3d 457, 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").

CONCLUSIONS OF LAW

1. Lippert Components, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Union of Operating Engineers, Local Union No. 150, A/W International Union of Operating Engineers, AFL–CIO (Respondent) is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent had a primary labor dispute with MacAllister Machinery and a secondary dispute with both Lippert Components and Thor Industries.
4. Respondent did not violated Section 8(b)(4)(i) and (ii)(B) of the Act by placing an inflatable rat and two banners outside Thor Industries RV Trade Show.

REMEDY

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[6]

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. July 15, 2019

[6] If no exceptions are filed as provided by Sec. 102.48 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.