

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

S.A.M.

DATE: December 20, 2018

TO: Peter S. Ohr, Regional Director
Region 13

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: International Brotherhood of Electrical Workers, 560-2575-6700
Local 134 560-2575-6767-2500
(Summit Design + Build) 560-7540-2000
Case 13-CC-225655

The Region submitted this case for advice as to whether the Union violated Section 8(b)(4)(i) and/or (ii)(B) by erecting a large, stationary banner proclaiming a labor dispute with the general contractor, as well as a large, inflatable cat clutching a construction worker by the neck, near the entrance to a construction site. We conclude that the Region should issue a Section 8(b)(4)(i)(ii)(B) complaint, absent settlement, and urge the Board to reconsider its decisions in *Carpenters Local 1506 (Eliason & Knuth of Arizona)*,¹ *Sheet Metal Workers Local 15 (Brandon Medical Center (Brandon II))*,² and *Carpenters Southwest Regional Councils Locals 184 & 1498 (New Star)*,³ and find that the Union's activity was tantamount to unlawful secondary picketing, and signal picketing that unlawfully induced or encouraged neutral employees to cease working, or at least constituted unlawfully coercive non-picketing conduct.

FACTS

Summit Design + Build ("Summit") is engaged in the business of construction consulting as well as planning and engineering residential and office work spaces. Summit is the general contractor for a project at 620 N LaSalle Street in Chicago, Illinois. Summit subcontracted the electrical work at the project to Edge Electric ("Edge"). The International Brotherhood of Electrical Workers, Local 134 (the

¹ 355 NLRB 797 (2010).

² 356 NLRB 1290 (2011).

³ 356 NLRB 613 (2011).

“Union”) has a primary labor dispute with Edge over Edge’s failure to pay area standard amounts in wages and benefits. On August 8, 2018,⁴ the Union wrote to Summit to state that the Union would engage in picketing and/or handbilling at the LaSalle job site in order to pressure Edge to pay area standards wages and benefits. By letter dated August 10, Summit replied that it was unaware if Edge payed area standards, and that Edge would not be at the job site until at least August 15.

On August 13, the Union posted agents near the job site entrance at 620 N LaSalle Street wearing orange vests that said “observer” on them. On August 14, the Union erected a large yellow banner that read “LABOR DISPUTE: SHAME SHAME,” and beneath those words, “SUMMIT DESIGN AND BUILD.” The Union also set up a large, inflatable fat cat, approximately 10-15 feet tall, clutching a construction worker by the neck. The banner and the cat were located approximately 15 feet from the entrance to the job site. Also on August 14, Summit emailed the Union to inform it that Edge would not be at the site until August 16, and that Summit would be implementing a reserved gate system to avoid enmeshing neutral businesses in the Union’s dispute with Edge. The Union returned to the job site and engaged in the bannering and erection of the cat on August 15 and August 16. The Union agents also distributed a handbill from August 14-16, which stated that the Union was in a labor dispute with Summit. On at least August 13-15, two subcontractors refused to enter the premises as a result of the labor dispute.

The Union admits that its activity was aimed at Summit, and that it does not have a primary labor dispute with Summit.

ACTION

We conclude that the Region should issue a Section 8(b)(4)(i) and (ii)(B) complaint, absent settlement, and urge the Board to reconsider its decisions in, *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, *Sheet Metal Workers Local 15 (Brandon Medical Center (Brandon II))*, and *Carpenters Southwest Regional Council Locals 184 & 1498 (New Star)*. In those decisions, the Board narrowed its definition of picketing, and thereby the scope of unlawful activity prohibited by Section 8(b)(4), and determined that certain union conduct, including the erection of stationary banners and an inflatable rat at neutral employers’ facilities, was lawful nonpicketing secondary activity under the Act. Specifically, the Region should argue: (1) that the Union’s erection of a large banner misleadingly claiming a labor dispute with the neutral, as well as the Union’s use of a large inflatable cat clutching a construction

⁴ All remaining dates are in 2018.

worker by the neck at a private construction jobsite, was tantamount to unlawful secondary picketing; (2) that the posting of the banner and cat constituted unlawful signal picketing; and (3) that even if this conduct was not tantamount to picketing, it was nevertheless unlawfully coercive and not shielded by the First Amendment because the Union was engaged in labor and/or commercial speech, both of which are entitled to lesser constitutional protection, and also because the banners were knowingly false speech unprotected by the First Amendment.

I. General Principles

A. Secondary picketing and other coercive conduct within the meaning of Section 8(b)(4)(i) and (ii)(B)

Section 8(b)(4)(i) and (ii)(B) makes it unlawful for a labor organization or its agents: (i) to induce or encourage employees to withhold their services from their employer or (ii) to threaten, coerce, or restrain any person engaged in commerce, where an object of the conduct is to force or require any person to cease doing business with any other person.⁵ Concern over unions pressuring neutral, secondary employers prompted Section 8(b)(4)(B), which is meant to simultaneously protect unions' right to exert legitimate pressure on employers with whom they have a primary labor dispute, and to shield neutral businesses from labor disputes not their own.⁶

The Board has found a wide array of conduct aimed at employees of neutral employers to constitute unlawful inducement or encouragement to cease work in violation of Section 8(b)(4)(i)(B). While traditional picketing at the premises of a neutral employer has long been held to violate Section 8(b)(4)(i)(B),⁷ the Board and

⁵ 29 U.S.C. § 158(b)(4)(i) & (ii)(B).

⁶ *NLRB v. Operating Engineers Local 825 (Burns & Roe, Inc.)*, 400 U.S. 297, 302-303 (1971); *see also NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 692 (1951).

⁷ *Laborers Eastern Regional Organizing Fund (Ranches at Mt. Sinai)*, 346 NLRB 1251, 1253 (2006) (patrolling and picketing at construction site when only neutrals' employees would be present establishes unlawful inducement and encouragement); *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB 638, 638-39 & n.10 (1999) (picketing at neutral employers' premises has the "foreseeable consequence" of unlawfully inducing or encouraging neutral's employees to withhold

courts have also held that union activity at a neutral's premises that falls short of traditional picketing may still send a "signal" to a neutral's employees that they should withhold their services. For example, in *Electrical Workers Local 98 (Telephone Man)*, a union agent stationed himself at the neutral gate at a construction site with a sign hanging around his neck that read "observer" and, when "conveniently flipped over," revealed language indicating that the primary employer did not pay appropriate wages.⁸ The Board concluded that the agent was not a benign observer but was rather engaged in unlawful signal picketing.⁹ Similarly, in *Sheet Metal Workers Local 19 (Delcard Associates)*, the Board affirmed the ALJ's conclusion that a union engaged in unlawful signal picketing by posting an agent in a rat costume near a neutral gate.¹⁰ By using a rat costume, the union "intentionally sought to create the impression that this was an unfair job," and thereby unlawfully induced and encouraged neutral employees to cease work.¹¹

In determining what exactly constitutes unlawful "threat[s], coerc[ion], or restrain[t]" under Section 8(b)(4)(ii)(B), the Supreme Court has determined that while handbilling at a neutral employer's business is lawful, picketing urging a boycott of the neutral employer is coercive and therefore unlawful.¹² That is because, the Court

their labor), *affirmed*, 52 Fed. App'x 357 (9th Cir. 2002); *see also Electrical Workers Local 501 v. NLRB (Samuel Langer)*, 341 U.S. 694, 699-704 (1951) (peaceful picketing at construction site where neutral was present was unlawful inducement or encouragement to neutral's employees to withhold their labor).

⁸ 327 NLRB 593, 593 (1999).

⁹ *Id.*

¹⁰ 316 NLRB 426, 437-38 (1995), *affirmed in relevant part*, 154 F.3d 137 (3d Cir. 1998).

¹¹ *Id.* at 438. *See also Warshawsky & Co. v. NLRB*, 182 F.3d 948, 953-54 (D.C. Cir. 1999) (handbilling decrying primary employer's substandard wages and benefits, that took place on access road to construction site at times when only neutral employees would be present, constituted unlawful inducement and encouragement), *certiorari denied*, 529 U.S. 1003 (2000).

¹² *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council (DeBartolo II)*, 485 U.S. 568, 579-80 (1988) (citing *NLRB v. Retail Clerks Local 1001 (Safeco Title Ins. Co.)*, 447 U.S. 607, 607 (1980)).

explained, “picketing is a mixture of conduct and communication and the conduct element often provides the most persuasive deterrent to third persons about to enter a business establishment.”¹³ Handbilling, by contrast, relies solely on the persuasive force of the idea within the handbill, rather than the confrontational element inherent in picketing.¹⁴

The Board and courts have historically defined picketing in a very broad and flexible manner.¹⁵ Patrolling and the carrying of picket signs have never been prerequisites to establish picketing.¹⁶ The Board and courts have found a variety of conduct to be picketing or tantamount to picketing, including: planting signs in a snowbank and then watching the signs from a parked car¹⁷; posting stationary agents with signs near an employer’s entrance¹⁸; disorderly conduct in front of a neutral’s business, including attaching a banner to the neutral’s building¹⁹; and the massed

¹³ *DeBartolo*, 485 U.S. at 580 (internal citations and quotation marks omitted).

¹⁴ *Id.*

¹⁵ See *Eliason & Knuth*, 355 NLRB at 815 (Members Schaumber and Hayes, dissenting). See also *Lumber & Sawmill Workers Local Union No. 2792 (Stoltze Land & Lumber)*, 156 NLRB 388, 394 (1965); *Mine Workers District 2 (Jeddo Coal Co.)*, 334 NLRB 677, 686 (2001); *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 743 (1993), *enforced memorandum*, 103 F.3d 139 (9th Cir. 1996); *Lawrence Typographical Union 570 (Kansas Color Press)*, 169 NLRB 279, 283 (1968), *enforced*, 402 F.2d 452 (10th Cir. 1968).

¹⁶ *Eliason & Knuth*, 355 NLRB at 814-15 (citing, *inter alia*, *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB at 743, 746); *Cf. DeBartolo II*, 485 U.S. at 571 (“the union peacefully distributed the handbills without any accompanying picketing or patrolling”) (emphasis added).

¹⁷ *NLRB v. Teamsters Local 182 (Woodward Motors)*, 314 F.2d 53 (2d Cir. 1963), *enforcing*, 135 NLRB 851 (1962).

¹⁸ *Jeddo Coal Co.*, 334 NLRB at 686. See also *Laborers Local 389 (Calcon Const.)*, 287 NLRB 570, 573 (1987) (union agents standing near stationary sign or sitting in parked van with sign on outside of van, constitutes picketing); *Painters District Council 9 (We’re Associates)*, 329 NLRB 140, 142 (1999) (“where groups of men are gathered around a sign ... they are engaged in picketing”) (internal citations omitted).

¹⁹ *Trinity Maintenance*, 312 NLRB at 746.

gathering of strikers and community members without picket signs or placards in a neutral hotel's parking lot where strikebreakers were staying.²⁰

Other conduct that the Board has found was not picketing but nevertheless coercive within the meaning of Section 8(b)(4)(ii)(B) includes broadcasting a message at extremely high volume through loudspeakers facing a neutral condominium building²¹; throwing bags full of trash into a building's lobby²²; and 20-70 union members marching in an elliptical pattern without signs while some distributed handbills.²³ In the latter case, the Board noted that the union's conduct had "overstepped the bounds of propriety and went beyond persuasion so that it became coercive to a very substantial degree."²⁴

B. In the Sphere of Labor Relations, the Government has a Substantial Interest in Justifying Some Restraints on First Amendment Freedoms

The Supreme Court has long recognized that in the "special context of labor disputes," speech is "subject to a number of restrictions."²⁵ In Section 8(b)(4), Congress sought to prohibit the "substantive evil" of the secondary boycott, and the Supreme Court has recognized that the First Amendment does not shield conduct

²⁰ *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 72 (1991), *enforced*, 977 F.2d 1470 (D.C. Cir. 1992).

²¹ *Carpenters (Society Hill Towers Owners' Assn.)*, 335 NLRB 814, 820-23 (2001), *enforced*, 50 F. App'x 88 (3d Cir. 2002).

²² *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB 638, 664-65, 680 (1999), *affirmed*, 52 F. App'x 357 (9th Cir. 2002).

²³ *Service Employees Local 399 (William J. Burns Agency)*, 136 NLRB 431, 436-37 (1962) (two members of the Board majority would, in fact, have labeled the union's conduct "picketing").

²⁴ *Id.*

²⁵ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 n.17 (1976).

that falls afoul of that prohibition.²⁶ As the Tenth Circuit has observed, “[t]he constitutional right of free speech and free press postulates the authority of Congress to enact legislation reasonably adapted to the protection of interstate commerce against harmful encroachments arising out of secondary boycotts.”²⁷

In a similar vein, commercial speech is also entitled to less constitutional protection, especially where it does not implicate the public interest.²⁸ In *DeBartolo II*, the Supreme Court declined to read Section 8(b)(4)(ii)(B) as prohibiting a union’s handbilling that pressed the advantages of unionization to the public.²⁹ In so holding, the Court noted that the union’s handbilling did not constitute commercial speech, inasmuch as the handbills did not “advertis[e] the price of a product or argu[e] its merits.”³⁰ However, the Court did not analyze the parameters of commercial speech, and it acknowledged that if a union *did* engage in commercial speech, that speech would be entitled to lesser constitutional protection.³¹

Additionally, it is well-established that intentionally false speech is not entitled to First Amendment protection.³² For example, in *San Antonio Hospital v. Southern*

²⁶ *International Bhd. of Elec. Workers, Local 501 v. NLRB (Samuel Langer)*, 341 U.S. at 705 (secondary picketing, as well as phone call emphasizing the purpose of the picketing, not protected by the First Amendment); *see also Safeco*, 447 U.S. at 616 (“[a]s applied to picketing that predictably encourages consumers to boycott a secondary business, § 8(b)(4)(ii)(B) imposes no impermissible restrictions upon constitutional protected speech”).

²⁷ *United Brotherhood of Carpenters and Joiners of America v. Sperry*, 170 F.2d 863, 869 (10th Cir. 1948) (placement of neutral employer on blacklist, promulgation of the blacklist, and picketing the neutral employer unprotected by the First Amendment).

²⁸ *Virginia Citizens Consumer Council*, 425 U.S. at 762-64.

²⁹ *DeBartolo II*, 485 U.S. at 575-76. The Court also applied the canon of constitutional avoidance because a finding that a union’s handbilling violated Section 8(B)(4)(ii)(B) would pose serious questions as to the constitutionality of that provision. *See id.*

³⁰ *Id.* at 576.

³¹ *Id.*

³² *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *see also Virginia Citizens Consumer Council*, 425 U.S. at 771 (citing *Gertz v. Robert Welch, Inc.*, 418

California District Council of Carpenters, the Ninth Circuit upheld a district court order that enjoined the union from using the word “rat” in a stationary banner held by union agents posted in front of the hospital.³³ In that case, the union had a primary labor dispute with one of the subcontractors employed by the hospital in an expansion project, and stationed agents near the entrance to the hospital with a banner that read, *inter alia*, “THIS MEDICAL FACILITY IS FULL OF RATS.”³⁴ While the union argued that “rat” has a “deep historical meaning in the context of labor disputes,” the court nevertheless determined that the union knew that the average member of the public would most likely deduce that the hospital had a rodent problem.³⁵ Because the union’s banner had crossed the line from permissible speech to fraudulent speech, it forfeited First Amendment protection.³⁶

II. The Board’s Decisions in *Eliason & Knuth*, *Brandon Medical Center (Brandon II)*, and *New Star*

In recent years, the Board has restricted the circumstances under which it will find a union to have engaged in conduct tantamount to picketing, thereby narrowing the intended reach of Section 8(b)(4). In *Eliason & Knuth*, the Board majority concluded that a union’s posting of agents holding large, stationary banners proclaiming “labor dispute” and “shame on [the employer]” in front of neutral businesses did not violate Section 8(b)(4)(ii)(B).³⁷ In particular, the Board majority stated its view that stationary bannering is not tantamount to picketing. Thus, for the

U.S. 323, 340 (1974)); *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980) (citing, *inter alia*, *Friedman v. Rogers*, 440 U.S. 1, 13, 15-16 (1979)).

³³ 125 F.3d 1230 (1997), *rehearing and suggestion for rehearing en banc denied*, 137 F.3d 1090 (9th Cir. 1998).

³⁴ *Id.* at 1233.

³⁵ *Id.* at 1236.

³⁶ *Id.* at 1238 (“[t]he policy of this state which characterizes the use of false or fraudulent statements in picketing as unlawful is within the permissible limits which a state may impose upon industrial combatants without impairing the right of free speech”) (internal quotation marks and citations omitted).

³⁷ 355 NLRB at 797.

first time, the Board held that the “carrying of picket signs and persistent patrolling” were necessary predicates to establish picketing.³⁸ In doing so, the Board majority acknowledged prior case law that articulated a broader definition of picketing, i.e., the posting of union agents at a business entrance to keep away employees and/or customers.³⁹ Nevertheless, the Board majority purportedly reconciled that broader precedent by noting that in many of those cases, the display of stationary signs was preceded by union agents’ ambulatory picketing, during which they often used traditional picket signs.⁴⁰ Moreover, the Board majority noted that many of those cases pre-dated the Supreme Court’s decision in *DeBartolo II*, and a definition of picketing that relied solely on the posting of a union agent near the entrance to an employer’s place of business was incompatible with *DeBartolo II*’s holding that handbilling near an entrance was lawful.⁴¹ In addition to concluding that the bannering was not equivalent to picketing, the *Eliason* Board also determined that the bannering was not otherwise coercive within the meaning of Section 8(b)(4)(ii)(B) because, e.g., it did not block ingress or egress to neutral businesses or otherwise disrupt the neutral businesses’ operation.⁴² Finally, applying the doctrine of constitutional avoidance, the Board determined that a finding that the bannering was unlawful would raise serious First Amendment issues, and so it declined to read Section 8(b)(4)(ii)(B) as proscribing the banner displays.⁴³

³⁸ *Id.* at 802.

³⁹ *Id.* at 803-804 (citing, e.g., *Stoltze Land & Lumber Co.*, 156 NLRB at 394 (posting union agents to confront customers and employees near employer’s entrance, picketing); *Kansas Color Press*, 169 NLRB at 283 (strikers, who sat in their cars at entrance to employer’s premises, and would confront members of public arriving at premises, were engaged in picketing); *Iron Workers Pacific Northwest Council (Hoffman Construction)*, 292 NLRB 562 n.2 (1989) (groups of union agents gathered around a sign constitutes picketing), *enforced*, 913 F.2d 1470 (9th Cir. 1990); *Jeddo Coal*, 334 NLRB at 686 (union agents standing with picket signs without patrolling, constitutes picketing).

⁴⁰ *Eliason & Knuth*, 355 NLRB at 804.

⁴¹ *Id.* at 803.

⁴² *Id.* at 805-806 (citing *Society Hill Towers Owners’ Assn.*, 335 NLRB at 820-23).

⁴³ *Id.* at 807-11.

Dissenting Members Schaumber and Hayes, meanwhile, would have found the bannering to be unlawful.⁴⁴ They argued that Section 8(b)(4)(ii)(B) was meant to broadly shield neutral, innocent employers from “nonjudicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing, or other economic retaliation or pressure in the background of a labor dispute.”⁴⁵ The dissent pointed to the extensive body of law in which the Board and courts have defined labor picketing flexibly and broadly.⁴⁶ Thus, the dissent argued that bannering was the “confrontational equivalent of picketing” that sought to induce the public to react with “emotions” and “fear of retaliation” rather than by appealing to the public’s reason.⁴⁷ Moreover, the dissent explained, the sheer size of the banners obviated the need for traditional patrolling and created a physical, or at least a “symbolic[ally] confrontational barrier” to those seeking access to the neutral’s premises.⁴⁸ Disagreeing with the majority’s contention that an expanded definition of picketing was inconsistent with the Supreme Court’s decision in *DeBartolo II*, the dissent noted that the Board had long adhered to an expanded definition of picketing, even in the wake of *DeBartolo II*.⁴⁹ The dissent argued that *DeBartolo*’s holding was limited to finding that *handbilling* at a neutral employer’s facility was lawful, inasmuch as the success of handbilling turns solely on persuasion.⁵⁰ Because a banner, by contrast, contains much less speech than a handbill, and mimics the confrontational aspects of a picket line, its success depends on intimidation, rather

⁴⁴ *Id.* at 811-21 (Members Schaumber and Hayes, dissenting).

⁴⁵ *Id.* at 813 (emphasis removed, internal quotation marks omitted) (citing *Carpenters Kentucky District Council (Wehr Constructors)*, 308 NLRB 1129, 1130 n.2 (1992) (quoting *Sheet Metal Workers Local 48 v. Hardy Corp.*, 332 F.2d 682, 686 (5th Cir. (1964))).

⁴⁶ *Id.* at 814-15.

⁴⁷ *Id.* at 815 (citing *NLRB v. United Furniture Workers*, 337 F.2d 936, 940 (2d Cir. 1964)).

⁴⁸ *Id.*

⁴⁹ *Id.* at 817-18 & n.30 (citing *Trinity Maintenance*, 312 NLRB at 743; *Jeddo Coal Co.*, 334 NLRB at 686).

⁵⁰ *Id.* at 817-18.

than mere persuasion.⁵¹ Finally, the dissenters disagreed with the majority's application of the doctrine of constitutional avoidance. They explained that, since the bannerling was tantamount to picketing, no constitutional concerns were raised, as it is settled law that secondary picketing is not entitled to First Amendment protection.⁵² Moreover, even if secondary bannerling were entitled to some First Amendment protection, the dissent noted that the government has a substantial interest in regulating labor relations that justifies some restrictions on free speech.⁵³ In this regard, the dissent observed that, unlike with handbilling, the conduct element of secondary bannerling predominates over the speech element, and therefore First Amendment concerns are not as strongly implicated.⁵⁴

In 2011, the Board extended the holding of *Eliason & Knuth* to hold that a union's use of a large, inflatable rat was neither picketing, nor otherwise coercive.⁵⁵ In *Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)*,⁵⁶ the union had set up a large, inflatable rat on a truck approximately 100 feet from the neutral hospital's front door.⁵⁷ The same three member Board majority that issued the

⁵¹ *Id.*

⁵² *Id.* at 820 (citing *Safeco*, 447 U.S. at 616).

⁵³ *Id.* 820-21 (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 n.17 (1976)).

⁵⁴ *Id.* at 821.

⁵⁵ *Brandon II*, 356 NLRB at 1292.

⁵⁶ 356 NLRB 1290 (2011). In the original Board decision in that case, the Board concluded that the union violated Section 8(b)(4)(ii)(B) by staging a "mock funeral" on public property in front of a hospital, including patrolling while carrying a fake casket and accompanied by a union member dressed as the Grim Reaper. *Sheet Metal Workers Local 15 (Brandon Regional Medical Center) (Brandon I)*, 346 NLRB 199 (2000), *enforcement denied*, 491 F.3d 429 (D.C. Cir. 2007). However, because the Board determined that finding the rat to be unlawful would simply be a cumulative violation with the mock funeral, it declined to pass on the lawfulness of the rat at that time. *Brandon Regional Medical Center*, 346 NLRB at 200, n.3. The Board's *Brandon II* decision issued after the D.C. Circuit denied enforcement of *Brandon I*.

⁵⁷ *Brandon II*, 356 NLRB at 1290.

decision in *Eliason & Knuth* held in *Brandon II* that the union's large inflatable rat did not constitute picketing where the rat was located at a significant distance from the hospital entrance, and where its attendants did not physically or verbally accost hospital patrons. The Board found that there was insufficient confrontation to render the conduct unlawful.⁵⁸ Notably, the Board majority acknowledged 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)(B)."⁵⁹

Member Hayes dissented in *Brandon II*, as he had done in *Eliason & Knuth*, and, contrary to the *Brandon II* majority, found that the union's use of an inflatable rat balloon, "a well known symbol of labor unrest," was tantamount to picketing.⁶⁰ Member Hayes concluded that the message for "pedestrians or occupants of cars passing in the shadow of a rat balloon, which proclaims the presence of a 'rat employer,'" was "unmistakably confrontational and coercive."⁶¹ Given its frequent use in labor disputes, Member Hayes also concluded that the union's use of a rat balloon was a signal to third parties of an invisible picket line they should not cross.⁶² As such, the union's intent in using the rat as a symbol of labor strife was to evoke from those confronted by the rat the same kind of reaction as if they had been confronted by a traditional picket line.⁶³ The predominant characteristic of the rat, like picketing, was to "intimidate by conduct, not to persuade by communication."⁶⁴

Also in 2011, the Board held in *Carpenters Southwest Regional Councils Locals 184 & 1498 (New Star)* that a union did not violate Section 8(b)(4) by erecting banners at 19 different neutral employers' premises claiming labor disputes with the neutrals and proclaiming "shame" on them.⁶⁵ In addition to applying *Eliason & Knuth* and

⁵⁸ *Id.* at 1292. As he did in *Eliason & Knuth*, Member Hayes dissented in *Brandon II*.

⁵⁹ *Id.* at 1294.

⁶⁰ *Id.* at 1296.

⁶¹ *Id.*

⁶² *See id.*

⁶³ *See id.*

⁶⁴ *Id.*

⁶⁵ 356 NLRB 613, 614 (2011).

determining that the banners did not constitute picketing and did not coerce the neutral employer under Section 8(b)(4)(ii)(B), the Board also concluded that the display of the banners at two construction sites did not induce or encourage neutral employees to cease working in violation of Section 8(b)(4)(i)(B).⁶⁶ The Board explained that the presence of the union's banners at construction sites closed to the public did not automatically mean they were directed at neutral employees, inasmuch as passing motorists could see the signs from the adjacent road, and because people in addition to the neutral employees entered the construction site, such as the owners and managers of the different contractors, as well as the property owners and the entity for whom the building was being built.⁶⁷ Moreover, even assuming the banners were directed at neutral employees, the Board would still not have found them to have constituted unlawful inducement of neutral employees because a union might want to simply "educate" neutral employees about the labor dispute, rather than ask them to stop working.⁶⁸

Member Hayes also dissented in *New Star*. In addition to noting that the union's banners were coercive under Section 8(b)(4)(ii)(B) because they were the "confrontational equivalent" to picketing, Member Hayes would have found that the banners also unlawfully induced or encouraged employees of the neutral to cease work in violation of Section 8(b)(4)(i)(B).⁶⁹ In this regard, Member Hayes argued that even if the union's conduct fell short of traditional picketing, the union nevertheless engaged in signal picketing that effectively requested that neutral employees refrain from entering and working at the site.⁷⁰ In particular, given that the banners did not correctly identify which employer the union had a primary labor dispute with, Member Hayes rejected as implausible the majority's position that the union was simply seeking to educate neutral employees about the labor dispute.⁷¹

⁶⁶ *Id.*

⁶⁷ *Id.* at 617.

⁶⁸ *Id.*

⁶⁹ *Id.* 619 (Member Hayes, dissenting).

⁷⁰ *Id.*

⁷¹ *Id.* at 620 & n.4.

III. The Region Should Argue that the Union's Use of the Banner and Inflatable Cat, Separately and Together, was Tantamount to Traditional Picketing and also Constituted Signal Picketing

The Region should use this case as a vehicle to urge the Board to reconsider its decisions in *Eliason & Knuth*, *Brandon II*, and *New Star* and conclude that the Union's conduct here was tantamount to traditional picketing and moreover constituted signal picketing. Thus, the Region should argue that the Union's erection of a stationary banner that misleadingly proclaimed a labor dispute with Summit, as well as its use of a large, inflatable cat clutching a construction worker by the neck, violated Section 8(b)(4)(i) and (ii)(B).

Specifically, the Region should argue that the Board's decisions in *Eliason & Knuth* and *Brandon II*, restricting the definition of picketing to circumstances where union agents carry picket signs while patrolling, were wrongly decided, inappropriately departed from the Board's previously broad and flexible definition of picketing, and should be overruled. The dissenters in those cases were right because the placement of union agents with large banners or inflatables at the entrances to neutral businesses sought to dissuade the public from entering through coercive conduct, rather than through a persuasive message, and therefore should have been considered tantamount to picketing under well-established law.⁷²

Applying the more reasonable definition of picketing that was in effect before *Eliason & Knuth* and *Brandon II*, the Union's conduct here violated the Act. The Union posted agents holding a big banner, and a large, intimidating inflatable cat clutching a worker by the neck, at the entrance to the construction site, with the undisputed aim of forcing Summit to cease using its electrical subcontractor Edge, with whom the Union had a primary dispute.⁷³ The Union agents' holding of a large, misleading banner—the functional equivalent of a picket sign—and the posting of a large, hostile-looking cat strangling a worker at the entrance to the site, were each tantamount to picketing because each created a symbolic, confrontational barrier to

⁷² *Eliason & Knuth*, 355 NLRB at 815-16; *Brandon II*, 356 NLRB at 1296-97.

⁷³ See, e.g., *Stoltze Land & Lumber*, 156 NLRB at 394 (“[t]he important feature of picketing” is posting union agents near the entrance to a neutral's business); *Jeddo Coal Co.*, 334 NLRB at 686 (same); *Trinity Maintenance*, 312 NLRB at 743 (same); *Kansas Color Press*, 169 NLRB at 283 (same).

anyone seeking to enter or work at the construction site.⁷⁴ Unlike the handbilling in *DeBartolo II*, the Union here did not simply seek to persuade the public about the justice of their cause by disseminating information in a non-confrontational manner such as a handbill, but rather sought to dissuade anyone from entering the site through intimidation and coercion.⁷⁵ The Region should emphasize that any member of the public needing to transact business at the site would—upon encountering a large, frightening cat gripping a worker by the neck, and a large banner proclaiming “LABOR DISPUTE: SHAME SHAME”—most likely stay away from the construction site due to a desire to avoid confrontation, rather than because of the strength of the Union’s message or to engage with the Union agents in an effort to understand their grievances.⁷⁶ Indeed, the efficacy of the Union’s approach was demonstrated by the refusal of two other subcontractors to perform work on three of the days the Union stationed its agents at the construction site.⁷⁷

Additionally, because the Union here engaged in conduct that was tantamount to picketing, the Region should stress that First Amendment concerns are not

⁷⁴ See *Eliason & Knuth*, 355 NLRB at 815 (Members Schaumber and Hayes, dissenting) (banners’ “imposing mass and length obviate the need for any patrolling”); *Brandon II*, 356 NLRB at 1296 (Member Hayes, dissenting) (display of inflatable rat “now frequent in labor disputes, constitutes a signal to third parties that there is, in essence, an invisible picket line that should not be crossed”).

⁷⁵ *Id.* at 817-18.

⁷⁶ See *id.* at 816 (“[a]version and avoidance are characteristic behaviors of persons being threatened, restrained, or coerced”).

⁷⁷ If the Region learns that individual employees employed at the construction site refused to work in response to the Union’s activity, such a finding would further support the Section 8(b)(4)(ii)(B) allegation. See *Teamsters Local 315 (Santa Fe)*, 306 NLRB 616, 631 (1992) (successfully inducing secondary employees to withhold their labor in violation of Section 8(b)(4)(i)(B) establishes violation of Section 8(b)(4)(ii)(B) as well), *enforced*, 20 F.3d 1017 (5th Cir. 1994); *Plumbers Local 398 (Robbins Plumbing)*, 261 NLRB 482, 487 (1982) (same). Such evidence is unnecessary to establish a violation of Section 8(b)(4)(i)(B). See *Painters District Council 9 (We’re Associates)*, 329 NLRB at 143; *Operating Engineers Local 150 (Hamstra Builders)*, 304 NLRB 482, 484 (1991).

implicated, inasmuch as it is settled law that the First Amendment does not shield unlawful secondary picketing.⁷⁸

The Region should also argue that the Board's decision in *New Star*, concluding that bannering at the private entrance to a construction site did not unlawfully induce neutral employees to cease work in violation of Section 8(b)(4)(i)(B), was wrongly decided and should be overruled. Dissenting Member Hayes was correct that the stationing of large banners proclaiming a labor dispute with the neutral, near the entrance to a construction site, was a clear attempt to signal neutral employees to strike.⁷⁹ Prior to *New Star*, the Board had consistently found similar union conduct at construction sites to be signal picketing in violation of Section 8(b)(4)(i)(B).⁸⁰

The Region should thus argue that the Union's conduct here was tantamount to picketing that violated Section 8(b)(4)(i)(B).⁸¹ In addition, applying the Board's pre-*New Star* precedent involving signal picketing, the Union's placement of a large, frightening cat and a misleading banner at a construction site was intended as a signal to neutral employees to not enter or work at the jobsite.⁸² Indeed, for three of

⁷⁸ *DeBartolo II*, 485 U.S. at 579-80; *Safeco Title Ins. Co.*, 447 U.S. at 607.

⁷⁹ See 356 NLRB at 618 (Member Hayes, dissenting).

⁸⁰ See, e.g., *Telephone Man*, 327 NLRB at 593; *Delcard Associates*, 316 NLRB 437-38. See also *Warshawsky & Co. v. NLRB*, 182 F.3d at 953-56.

⁸¹ See *Laborers Eastern Regional Organizing Fund (Ranches at Mt. Sinai)*, 346 NLRB at 1253; *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB at 638-39 & n.10; *Electrical Workers Local 501 v. NLRB (Samuel Langer)*, 341 U.S. 69 at 699-704.

⁸² See *Delcard Associates*, 316 NLRB at 437-38 (observer in rat costume unlawfully induced or encouraged neutral employees to halt work; "rat" connotes destruction of wages); *Telephone Man*, 327 NLRB at 593 (observer posted at neutral gate in reality engaged in unlawful signal picketing). Although the handbill the Union distributed contained language indicating that the Union was not requesting a cessation of work, that language is insufficient to remedy the otherwise unlawful signal created by the inflatable cat and banner, especially because employees might turn away without even reading the handbill. See, e.g., *Teamsters local 917 (Industry City)*, 307 NLRB 1419, 1422-23 (1992) (picket signs asserting area wages dispute and calling for boycott of neutrals "patently sought to induce employees to cease working" despite statement disclaiming intent to induce work stoppage).

the four days the Union engaged in this conduct, the Union knew Edge and its employees were not present at the construction site. Nor were the Union's actions meant to educate neutral employees about its primary labor dispute, since the banner failed to name Edge.⁸³ As such, the Union's conduct constituted signal picketing that violated Section 8(b)(4)(i)(B).

IV. The Region Should Alternatively Argue that Even if the Union Engaged in Non-Picketing Conduct, that Conduct was Nevertheless Unlawfully Coercive

In the alternative, the Region should argue that the Union's activity, even if not tantamount to picketing, was nevertheless unlawful coercion or restraint within the meaning of Section 8(b)(4)(B). Thus, consistent with longstanding Board law finding that broadcasting a message at extremely high volume through loudspeakers,⁸⁴ throwing bags full of trash into a building's lobby,⁸⁵ and massed marching without signs,⁸⁶ was unlawfully coercive, the Union's conduct here—the posting near the job site entrance of the large, misleading banner and the intimidating, violent cat strangling a construction worker—“overstepped the bounds of propriety and went beyond persuasion so that it became coercive to a very substantial degree.”⁸⁷

If the Board finds that the conduct was not tantamount to picketing, but was nevertheless unlawfully coercive, it will need to address the First Amendment issues raised by such a finding. As to that issue, the Region should argue that the Union's conduct is entitled to lesser First Amendment protection because it is labor and/or commercial speech. The Government has a heightened interest in regulating labor speech because of its direct effect on interstate commerce.⁸⁸ Commercial speech is deserving of its “subordinate position in the scale of First Amendment values,”

⁸³ See *New Star*, 356 NLRB at 620 & n.4 (Member Hayes, dissenting).

⁸⁴ *Society Hill Towers Owners' Assn.*, 335 NLRB at 820-23.

⁸⁵ *General Maintenance Co.*, 329 NLRB at 664-65, 680.

⁸⁶ *William J. Burns Agency*, 136 NLRB at 436-37.

⁸⁷ *Id.*

⁸⁸ See notes 25-27 and accompanying text.

because much of it is not in the public interest.⁸⁹ Here, the Union’s coercive conduct sought to enmesh a neutral business and therefore spread labor discord in exactly the way Congress sought to prohibit. To the extent this conduct involved “speech,” it was labor speech, and was therefore entitled to lesser First Amendment protection. And, given the dearth of information provided by the Union to the public about what exactly its supposed labor dispute with Summit was, i.e., it did not state that it was pressing for better area wages, or even identify Edge, the subcontractor with whom the Union actually had a dispute, the image conveyed to the public by the frightening, violent cat clutching the construction worker’s neck and the large banner was that Summit is a “bad” business that should not be patronized. As such, the Union’s “speech” constituted commercial speech arguing the merits of a business, as opposed to pressing the benefits to the public of union area wages and standards, and it is entitled to lesser constitutional deference for that reason as well. Finally, the Region should argue that because the Union did not have a labor dispute with Summit, the Union’s handbills and banner claiming otherwise were false speech undeserving of First Amendment protection.⁹⁰

Accordingly, the Region should issue complaint, absent settlement, consistent with the foregoing.

/s/
J.L.S.

ADV.13-CC-225655.Response.Summit.

(b) (6), (b) (7)(C)

⁸⁹ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978). *Cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 761 (the advertisement at issue did not seek to “editorialize on any subject, cultural, philosophical, or [po]litical”).

⁹⁰ *See* notes 32-36.