UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150	:	
and	:	Case No. 25-CC-228342
LIPPERT COMPONENTS, INC.	:	

BRIEF *AMICUS CURIAE* OF ASSOCIATED BUILDERS AND CONTRACTORS

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I. STATEMENT OF INTEREST

Associated Builders and Contractors ("ABC") hereby submits this brief as *amicus curiae* in response to the Board's Notice and Invitation to File Briefs, 370 NLRB No. 40 (Oct. 27, 2020). ABC is a national construction industry trade association representing more than 21,000 members. ABC and its sixty-nine chapters, including its Illinois chapter, represent all specialties within the U.S. construction industry – general contractors, subcontractors, suppliers, developers, and other businesses associated with construction. ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, which is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

ABC and its members have a direct interest in this case because they have been targeted by labor organizations in different parts of the country with confrontational, secondary activity of the types evidenced in this case: including large inflatable rat balloons and banners intended to exert pressure on neutral customers to refrain from transacting business with ABC contractors. ABC previously joined an *amicus* brief in support of the General Counsel's complaint against a similar rat balloon in Philadelphia, PA in the pending case of *International Brotherhood of Electrical Workers, Local Union 98*, Case No. 4-CC-223346. ABC also participated in the cases referenced in the Board's Notice, *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). For the reasons explained below, ABC urges the Board to adopt a rule of law that the utilization of rat balloons and confrontational banners is a form of "picketing" that should be prohibited whenever such use threatens, coerces, or restrains protected parties within the meaning of the Act.

II. QUESTIONS PRESENTED BY THE BOARD

The Board's Notice asked *amici* to respond to the following questions. ABC's answers are briefly stated here and are explained in greater detail in the brief that follows:

1) Should the Board adhere to, modify, or overrule *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)? **ABC's answer**: The Board should modify or overrule the foregoing cases, which departed from decades of prior precedent and are contrary to the Act.

2) If you believe the Board should alter its standard for determining what conduct constitutes proscribed picketing under Section 8(b)(4), what should the standard be? **ABC's answer**: The Board should return to the standard that was in place prior to *Eliason* and *Brandon II*, which proscribed any confrontational signs or postings that signalled, threatened, coerced, or restrained protected parties within the meaning of the Act. Rat balloons *per se*, and other related banners of the type at issue in this case, clearly should be prohibited under the Board's previous standard.

3) If you believe the Board should alter its standard for determining what non-picketing conduct is otherwise unlawfully coercive under Section 8(b)(4), what should the standard be? **ABC's answer**: Same as above.

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? **ABC's answer:** As the Board and courts held prior to *Eliason & Knuth* and *Brandon II*, the First Amendment does not protect confrontational, threatening, or coercive conduct engaged in for the unlawful purpose of secondary boycotts.

III. ARGUMENT

A. The Board Should Modify or Overrule Existing Case Law Dealing With Rat Balloons And Similar Coercive Union Tactics and Reinstate Previous Standards.

Under the Board's ill-advised holdings 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), labor unions over the last decade have been able to station inflatable rats at neutral locations in a threatening, coercing, and restraining manner with impunity.[1] It is therefore past time for the Board to overrule those decisions and to return to the definition of picketing and other forms of coercive union conduct towards neutrals that should outlaw the practices at issue here under Section 8(b)(4)(ii)(B) of the Act.

See Robert Channick, Born in Chicago, Scabby the Giant Inflatable Protest Rat May Be Banned From Picket Lines by National Labor Relations Board, Chicago Tribune, http://www.chicagotribune.com/business/ct-biz-scabby-giant-rat-balloon-union-protest-ban-20190807-fbqnn7rorne75oc2w72wel3ise.story. (Describing use of giant inflatable rats "as tall as 25 feet": "There is no disputing that the rat balloons were meant to be threatening.") Unions have used inflatable rats to exert pressure on members of the public and employees to refrain from patronizing neutral third party establishments. This practice has continued unchecked in Chicago and elsewhere in connection with unlawful union efforts to restrain competition via secondary boycott activity.

ABC agrees fully with the General Counsel's brief in support of exceptions, and with the General Counsel's stated rationale in the Advice Memorandum that preceded this litigation, which concluded that *Eliason* and *Brandon II* should be overruled:

[1] The *Eliason* case did not expressly deal with giant rat balloons, but only with confrontational banners posted near neutral entrances. However, the Board in *Brandon II* expressly relied on *Eliason's* analysis to hold that rat balloons did not violate Section 8(b)(4) either.

> [T]he 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.

Advice Mem., 13-CC-225655 at pp. 14-15. As further explained below, the legislative history and plain language of the Act support modifying or overruling the Board's *Eliason* and *Brandon II* decisions.

1. *Eliason* and *Brandon II* Improperly Departed From the Legislative Purpose Behind Section 8(b)(4)(ii)(B) Of The Act.

Section 8(b)(4)(ii)(B) of the Act provides, in pertinent part, that it shall be "an unfair labor practice for a labor organization . . . to threaten, coerce, or restrain a person not party to a labor dispute 'where . . . an object thereof is . . . forcing or requiring [such person] to . . . cease doing business with any other person.'" *N.L.R.B. v. Retail Store Emp. Union, Local 1001*, 447 U.S. 607, 611 (1980) (quoting 29 U.S.C. §158 (b)(4)(ii)(B)); *see Silverman v. Verrelli*, No. Civ. A. 11-6576 SRC, 2012 WL 395665, at *3 (D.N.J. Feb. 7, 2012) ("[the Act] specifically prohibits [] a labor union from threatening, coercing, or restraining a person engaged in commerce or in an industry affecting commerce with the object of forcing that person to cease doing business with another."). "Congressional concern over the involvement of third parties in labor disputes not their own prompted 8(b)(4)(B) . . . this concern was focused on the 'secondary boycott,' which was conceived of as pressure brought to bear, not 'upon the employer who alone is a party (to a dispute), but upon some third party who has no concern in it 'with the objective of forcing the third party to bring pressure on the employer to agree to the union's demands." *N.L.R.B. v. Local 825, Int'l Union of Operating Engineers, AFL-CIO*, 400 U.S. 297, 302-03 (1971). As explained by Board Members Schaumber and Hayes:

> The legislative history of Section 8(b)(4) demonstrates both that Congress intended the Section to 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.

Eliason, 355 NLRB 797, 813-14 (2010) (dissent).

2. *Eliason* and *Brandon* Improperly Departed From the Board's Previously Settled Expansive Definition of Picketing, Which Should In Any Event Apply to Giant, Menacing Rats.

Section 8(b)(4)(ii)(B) "prohibit[s] peaceful picketing, persuasion, and encouragement, as well as non-peaceful economic action, in aid of the forbidden objective" because "Congress thought that [secondary boycotts] were unmitigated evils and burdensome to commerce." *See Eliason*, 355 NLRB at 813-14 (dissent) (quoting *Carpenters (Wadsworth Building)*), 81 NLRB 802, 812 (1949), *enfd*, 184 F.2d 60 (10th Cir. 1950) (cited with approval in *International Bhd. of Elec. Workers, Local 501 v. NLRB*, 341 U.S. 694, 704 (1951)). Therefore, and as correctly pointed out by the General Counsel, even peaceful picketing or persuasive conduct in aid of the secondary boycott objective is unlawful under Section 8(b)(4). (*See* Brief in Support of the General Counsel's Exceptions to ALJ Decision, at p. 14-15).

Historically, both the Board and courts across the United States prior to 2010 defined picketing in a very broad and flexible manner. *See Lumber & Sawmill Workers Local Union No. 2792 (Stoltze Land & Lumber)*, 156 NLRB 388, 394 (1965). In doing so, a broad range of conduct was found to constitute secondary picketing, and neither patrolling nor the carrying of signs were deemed prerequisites to secondary picketing activity. *See, e.g., NLRB v. Teamsters Local 182 (Woodward Motors)*, 314 F.2d 53 (2d Cir. 1963), *enfg.*, 135 NLRB 851 (1962) (planting signs in a snowbank and then watching the signs from a parked car constituted picketing); *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 72 (1991), *enfd.*, 977 F.2d 1470 (D.C. Cir. 1992) (massed gathering of strikers and community members without picket signs or

placards in neutral hotel's parking lot where strikebreakers were staying); *Serv. Employees Union*, 312 NLRB 715, 746 (1993) (posting stationary agents with signs near an employer's entrance, disorderly conduct in front of a neutral's business, including attaching a banner to the neutral establishment); *see also Carpenters, Local 2797 (Stoltze Land & Lumber Co.)*, 156 NLRB 388, 394 (1965) ("[t]he important feature of picketing" is posting union agents near the entrance to a neutral's business); *United Mine Workers of Am., Dist. 2*, 334 NLRB 677, 686 (2001) (recognizing same principle).

In *Electrical Workers Local 98 (Telephone Man)*, 327 NLRB 593 (1999), the union placed a stationary agent outside the neutral gate of a construction site, with a sign hanging around his neck that read "observer" and also contained language regarding the primary employer's alleged failure to pay prevailing wage. Despite the fact that the union agent took a stationary position without patrolling, the Board found that he had engaged in unlawful secondary signal picketing in violation of Section 8(b)(4)(ii)(B) of the Act. In reaching its decision, the Board properly found that such "observer" activity was for no other purpose than to signal employees of neutral employers not to enter the workplace. 327 NLRB at 600.

As in *Electrical Workers Local 98 (Telephone Man)* – the facts here illustrate that Local 150 and labor unions across the nation are engaging in confrontational activity through their use of giant, menacing rat balloons, which cannot be meaningfully distinguished from secondary picketing. There can be no serious dispute that Local 150's conduct was premised upon an unlawful secondary objective. The stationing of a giant inflatable rat at the entrance of a neutral establishment in this case is if anything more confrontational, threatening and intimidating than posting stationary picket signs or agents near the entrance of a neutral establishment in the manner previously found unlawful. In addition, as with the posting of stationary signs or agents, Local 150's use of a large inflatable rat for the purpose of a secondary boycott, was

confrontational and sent a signal to both secondary employees and customers of neutral businesses that they should not cross the "rat line", thereby restraining them.

Contrary to the Judge's ruling and the briefs of the Union and its *amici,* Local 150's erection of a giant inflatable rat next to the entrance of a neutral establishment underscores the need for *Eliason, Brandon II*, and subsequent derivative holdings to be overturned. As noted above, in those decisions, the Board applied an overly-restrictive definition of picketing, which belies the plain meaning of the term and improperly undermines the legislative purpose behind the prohibitions set forth in Section 8(b)(4)(ii)(B). *See Hardt v. Reliance Standard Life Ins. Co.,* 560 U.S. 242, 251 (2010) (citing *United States v. Gonzales,* 520 U.S. 1, 4 (1997)) (enforcing "plain and unambiguous statutory language according to its terms"). In essence, the Board decisions in those cases effectively (and improperly) restricted the definition of picketing to situations in which union agents *physically restrain* access to neutral establishments. In doing so, the Board failed to account for the well-documented fact that labor unions employ a wide variety of picketing tactics, which may be non-physical in nature, but have the exact same intent and effect. Contrary to the Board's holding *Brandon II,* the erection of giant inflatable rats at or near the entrances of neutral establishments plainly constitutes a form of picketing under previously settled definitions, thereby deterring access to neutrals and disrupting their business operations, all in violation of Section 8(b)(4).

3. Giant Rats and Related Coercive Banners Violate the Secondary Boycott Law Even If They Are Not Deemed to be Picketing.

Even where conduct does not amount to "picketing", it may still be coercive and prohibited by the plain meaning of Section 8(b)(4)(ii)(B). Indeed, the Board has consistently found a wide variety of "non-picketing" conduct to violate Section 8(b)(4)(ii)(B). *See e.g., Metropolitan Regional Council, Carpenters (Society Hill Towers Owners' Assn.),* 335 NLRB 814, 820-23 (2001), *enfd,* 50 F. App'x 88 (3d Cir. 2002) (broadcasting a message at extremely

high volume through loudspeakers facing a neutral condominium building was coercive conduct that violated § 8(b)(4)(ii)(B)); *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB at 746-748 (1993) (same); *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB 638, 664-65, 680 (1999), enfd, 52 F. App'x 357 17 (9th Cir. 2002) (holding that union engaged in coercive conduct by throwing bags full of trash into a building lobby).

In analyzing the broad scope of Section 8(b)(ii)(4)(B), the U.S. District Court for the Northern District of Georgia highlighted the fact that unlawful coercive conduct can be found under any of the following circumstances:

> [A] union handbills or banners at the approach of a neutral secondary employer, such as a hospital or hotel, and stages processions; patrols; shouts; acts aggressively; makes threats; physically or verbally interferes with or confronts persons coming and going from the establishment; creates a symbolic barrier to those who would enter the establishment; or uses speakers to broadcast messages at an excessive volume toward a building that hired a primary employer as a subcontractor.

Circle Grp., L.L.C. v. Se. Carpenters Reg'l Council, 836 F. Supp. 2d 1327, 1359 (D. Ga. 2011) (citations omitted). As clearly demonstrated in all of these cases, where a labor organization engages in coercive conduct or threatens to directly disrupt a neutral establishment's operations, the union's conduct will violate Section 8(b)(4)(ii)(B) of the Act. *See Serv. & Maint. Employees, Local 399 (William J. Burns Detective Agency)*, 136 NLRB at 437 (finding that even if union's conduct did not constitute picketing, it still violated Section 8(b)(4)(ii)(B) because it "overstepped the bounds of propriety and went beyond persuasion so that it became coercive to a very substantial degree.").

Here, as discussed above, Local 150's stationing of a large inflatable rat at the entrance of neutral establishments constituted unlawful secondary picketing and should be treated as such. However, even assuming that Local 150's use of the inflatable rat and related banners somehow did not constitute "picketing", it is clear that their presence was still coercive and violated Section 8(b)(4)(ii)(B).

B. The Board Should Return to the Standard Used to Determine Proscribed Picketing and Non-Picketing Conduct Prior to the *Eliason* and *Brandon* Decisions.

In response to the Board's question how to determine proscribed picketing and non-picketing conduct if *Eliason* and *Brandon* are modified or overruled, the answer is straightforward: The Board should return to the well-accepted definitions of these terms that the foregoing cases ignored, improperly distinguished, or overruled. Under such pre-existing case law, as noted above, it was well understood that picketing did not require patrolling or carrying picket signs but instead included stationary signs observed even from a distance by union agents. *NLRB v. Teamsters Local 182 (Woodward Motors)*, 314 F.2d at 57-58 (relying on a dictionary definition of picketing in Webster's dictionary that is substantively unchanged today – *see* https://www.merriam-webster.com/dictionary/picket); *see also Laborers Local 389 (Calcon Constr. Co.)*, 287 NLRB at 573 ("In none of these definitions is the patrolling or the carrying of signs considered a requisite component part of picketing. The purpose of picketing in labor disputes is to convey a message which is usually intended to influence the conduct of certain persons to stay away from work or to boycott a product or business, and is frequently accomplished, as was done herein, by posting individuals at the approaches to a place of work"). *See also IBEW, Local 98 (Telephone Man)*, 327 NLRB at 593 (signal picketing found unlawful); *Sheet Metal Workers Local 19 (Delcard Associates)*, 316 NLRB at 437-38 (same).

As further discussed above, non-picketing conduct was long held to violate the Act prior to *Eliason* and *Brandon II*, where such conduct coerced and intimidated neutral employees or customers in order to cause them to withhold services in violation of Section 8(b)(4). *Service Employees Local 399 (William J. Burns Agency)*, 136 NLRB at 436-37 ("coercive" distribution of handbills); *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB at 664-65 (throwing trash); *Metropolitan Regional Council, Carpenters (Society Hill Towers Owners'*

Assn.), 335 NLRB at 820-23 (loud noisemaking at neutral site). As described above, an appropriate standard for non-picketing activity violating the Act is the standard set forth by the district court in *Circle Grp., L.L.C. v. Se. Carpenters Reg'l Council*, 836 F. Supp. 2d at 1359, *i.e.*, union conduct that "creates a symbolic barrier" (or a physical one) against doing business with a boycotted neutral establishment or person.

C. The Use of Giant, Menacing Rats For Secondary Boycott Purposes Is Not Protected By the First Amendment

It is well-established that unlawful secondary picketing by labor unions does not amount to protected activity under the First Amendment. *See Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc.*, 456 U.S. 212, 226 (1982) (citing *N.L.R.B. v. Retail Store Emp. Union, Local 1001*, 447 U.S. 607, 615 (1980); *see also F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 428 (1990) (citing *Retail Store Emp. Union, Local 1001*, 447 U.S. at 616 ("[s]econdary boycotts and picketing [] 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.'"); *Int'l Bhd. of Elec. Workers, Local 501 v. NLRB*, 341 U.S. at 705 (First Amendment did not protect secondary picketing or phone calls that emphasized the purpose of that secondary picketing). In short, "[a]s applied to picketing that predictably encourages consumers to boycott a secondary business, § 8(b)(4)(ii)(B) imposes no impermissible restrictions upon constitutionally protected speech." *Retail Store Emp. Union, Local 1001*, 447 U.S. at 607.

Nor does the Supreme Court's *DeBartolo II* decision hold that the First Amendment prevents the Board from enforcing the secondary boycott provisions of the Act as to picketing or coercive non-picketing union conduct. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg.& Const. Trades Council*, 485 U.S. 568 (1988). As the dissenters in *Eliason* pointed out: "Nothing in *DeBartolo II* even hints that the Supreme Court intended to change the Board's

longstanding and flexible definition of picketing, or the well-established understanding that posting an individual at a neutral's premises is sufficient to establish 8(b)(4)(ii)(B) coercion." 355 NLRB at 818. *See also Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15, AFL-CIO*, 418 F.3d 1259, 1265 (11th Cir. 2005) ("*DeBartolo* reaffirmed longstanding Supreme Court precedent that the Board can regulate union secondary picketing under [§] 8(b)(4)(ii)(B) without implicating the First Amendment."). To that end, in *Mid-Atl. Reg'l Council of Carpenters*, the Board explained:

> Although the Court recognized in *Tree Fruits* that the Constitution might not permit a broad ban against peaceful picketing, the Court left no doubt that Congress may prohibit secondary 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 . . . . Such picketing spreads labor discord by coercing a neutral party to join the fray. In *Electrical Workers v. NLRB*, 341 U.S. 694, 705 (1951), this Court expressly held that a prohibition on picketing in furtherance of (such) unlawful objectives did not offend the First Amendment . . . . We perceive no reason to depart from that well- established understanding…

356 NLRB 61, 67 (2010) (citations omitted); *see also Metro. Reg'l Council of Philadelphia & Vicinity*, 50 F. App'x at 91 (rejecting union's argument that its "broadcasts were protected First Amendment speech," while noting that the Supreme Court has "consistently rejected the claim that secondary picketing by labor unions [] is protected activity under the First Amendment.").

Here, Local 150 and its *amici* argue that unions' use of the inflatable rat creates "serious" First Amendment concerns, which warrant application of the constitutional avoidance doctrine. The *amici* brief filed by the Illinois AFL-CIO, p.2, goes so far as to incredibly assert that a 12-foot-high inflatable rat with red eyes and fangs is to unions "what the American flag is to United States citizens." To the contrary, the giant rat sends a threatening message of intimidation and coercion, with a known objective of preventing neutrals from crossing the line where it is placed. Such secondary conduct is not protected by the First Amendment.

Stationing a 12-foot inflatable rat with sharp claws and a perpetual snarl at the entrance of a neutral establishment sends a signal to any neutral party that they enter at their peril, a message which removes the conduct from the realm of "free speech" and places it in the prohibited category as secondary picketing. Because it is well-settled that conduct tantamount to secondary picketing does not implicate the First Amendment, neither Local 150 nor similarly situated labor unions across the United States should be afforded any protection for their use of inflatable rats or related, confrontational banners to engage in secondary boycotts.

IV. CONCLUSION

For the reasons set forth above, ABC respectfully submits that the Board should return to the standards that were in place prior to the *Eliason* and *Brandon II* decisions, and adopt a clear rule of law in this case that the use of rat balloons and related banners to coerce neutrals constitutes unlawful secondary activity by a labor organization.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November 2020, the forgoing Amicus Brief of Associated Builders and Contractors was electronically filed and served by email on the date stated above on the following:

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