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

October 27, 2020

NOTICE AND INVITATION TO FILE BRIEFS

BY CHAIRMAN RING AND MEMBERS KAPLAN, EMANUEL, AND MCFERRAN

On July 15, 2019, Administrative Law Judge Kimberly Sorg-Graves issued a decision in the above-captioned case, applying *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010), and *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB 1290 (2011), to find that the Union's stationary display of a 12-foot inflatable rat and two large banners[1] on public property located near the entrance of an RV trade show, a neutral site, did not constitute picketing or otherwise coercive nonpicketing conduct that violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act.

In *Eliason & Knuth*, union members held large stationary banners on public property outside neutral employers' facilities that advised of a labor dispute and either declared "shame on" the neutral employer or expressly urged the public not to patronize it. 355 NLRB at 797–798. The Board held that the displays of stationary banners (1) were not proscribed picketing because they did not entail confrontation on par with patrolling an entrance while carrying picket signs and (2) were not otherwise unlawfully coercive because the banners did not directly disrupt or threaten to directly disrupt the neutral employers' operations. Id. at 801–804. In *Brandon Regional Medical Center*, the Board similarly found a 16-foot inflatable rat mounted on a trailer on public property outside a neutral employer was not unlawful picketing or otherwise coercive conduct. 356 NLRB at 1290–1293.

Excepting to the judge's decision, the General Counsel urges the Board to overrule both *Eliason & Knuth* and *Brandon Regional Medical Center*. In those cases, the General Counsel contends, the Board narrowed the definitions of picketing and coercion, created standards that were "vague and imprecise," strayed from "the dictates of Section 8(b)(4)," and departed from "decades of Board law." The General Counsel maintains that the display here of the tall inflatable rat and two large banners was tantamount to picketing, or constituted otherwise coercive conduct, to unlawfully pressure neutral employers to cease doing business with the primary employer in the labor dispute.

To aid in consideration of these issues, the Board now invites the filing of briefs in order to afford 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 Section 8(b)(4), what should the standard be?
3. If you believe the Board should alter its standard for determining what nonpicketing conduct is otherwise unlawfully coercive under Section 8(b)(4), what should the standard be?
4. Why would finding that the conduct at issue in this case violated the National Labor Relations Act under any proposed standard not result in a violation of the Respondent's rights under the First Amendment?

Briefs by the parties and amici not exceeding 25 pages in length shall be filed with the Board in Washington, D.C., on or before November 27, 2020, and December 28, 2020, respectively. The parties may file responsive briefs on or before January 11, 2021, which shall not exceed 15 pages in length. No other responsive briefs will be accepted. The parties and amici shall file briefs electronically by going to www.nlrb.gov and clicking on "eFiling." The parties and amici are reminded to serve all case participants. A list of case participants may be found at http://www.nlrb.gov/case/25-CC-228342. If assistance is needed in E-filing on the Agency's website, please contact the Office of Executive Secretary at 202-273-1940 or Executive Secretary Roxanne Rothschild at 202-273-2917.

Dated, Washington, D.C. October 27, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

[1] The banners read: "OSHA Found Safety Violations Against [the Primary Employer]" and "Shame on [a Neutral Employer] for Harboring Rat Contractors."

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

Like the pied piper of Hamelin, the General Counsel now offers to rid the field of labor relations of a supposed rat problem—yet here, too, following the piper's lead may result in dire consequences. The General Counsel asks the Board to overrule precedent, carefully reasoned and rooted firmly in court authority, concluding that the National Labor Relations Act does not prohibit the noncoercive, nondisruptive use of inflatable rats and stationary banners to publicize a labor dispute—and, indeed, that restricting such activity threatens First Amendment rights.[1] If the majority ultimately follows the General Counsel's lead and adopts his extreme views on banners and rats, the purposes of the Act will not be well served, and the First Amendment would be in as grave a danger as the unfortunate children of Hamelin. There is no reason to take even the first step down this road.

As Board and court cases make clear, the General Counsel's view cannot be squared with either First Amendment principles or the settled understanding of the intent of Section 8(b)(4).[2] While the General Counsel might find inflatable rats distasteful, federal courts have repeatedly affirmed that "unsettling and even offensive speech is not without the protection of the First Amendment."[3] Further, the Board's current standard governing such speech has proven durable and largely uncontroversial. In at least 12 Board decisions since the Board articulated its current standard in the 2010 *Eliason* decision, the Board has found stationary banners or inflatables to be lawful under Section 8(b)(4).[4] No federal appellate court decision has ever cast doubt on the *Eliason* standard. Similarly, in Section 10(l) injunction proceedings and Section 303 suits, the federal district courts have repeatedly, uniformly, and correctly rejected the theory that communicating with the public using inflatables and stationary banners, without more, violates Section 8(b)(4).[5]

[1] See *Carpenters Local 1506 (Eliason & Knuth)*, 355 NLRB 797 (2010); *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB 1290 (2011). Most of the cases, including this one, involving an inflatable rat and stationary banners are 8(b)(4)(B) cases. That is, they involve the union objective of pressuring a secondary employer—typically an entity in a business relationship with the employer with which the union has its primary dispute—to cease doing business with the primary employer. This objective, as well as any of the objectives set forth in Secs. 8(b)(4)(A), (C), and (D), are one element of a 8(b)(4) violation. However, a violation is made out if and only if, in addition, the union's means of pursuing its objective are also improper. The question posed in this case is whether, even if the Union's objective falls within Sec. 8(b)(4), the Union's conduct constitutes an improper means of achieving its objective.

[2] See *Eliason & Knuth*, supra, 355 NLRB at 801 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 584 (1988)) ("focus of Congress was picketing, not 'peaceful persuasion of customers by means other than picketing'"); *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)); *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 by Sec. 8(b)(4), the Act should be interpreted to permit such banners).

[3] *Sheet Metal Workers Local 15*, supra, 491 F.3d at 439.

[4] See *Laborers Local 872 (Westgate)*, 363 NLRB 1633 (2016) (inflatables, including rat and cockroach, lawful); *Carpenters Local 1827 (UPS, Inc.)*, 357 NLRB 415 (2011) (large banners lawful); *Sheet Metal Workers Local 15 (Brandon Reg'l Med. Ctr.)*, supra (inflatable rat lawful); *SW Reg'l Council of Carpenters (New Star)*, 356 NLRB 613 (2011) (banners lawful); *Mid-Atlantic Regional Council of Carpenters (Starkey Construction Co.)*, 356 NLRB 61 (2010) (same); *Carpenters Local 1506 (Held Properties II)*, 356 NLRB 42 (2010) (same); *Carpenters Local 1506 (Held Properties I)*, 356 NLRB 21 (2010) (same); *SW Regional Council of Carpenters (Richie's Installations, Inc.)*, 355 NLRB 1445 (2010) (same); *Carpenters Local 1506 (Marriott Warner Center Woodland Hills)*, 355 NLRB 1330 (2010) (same); *Carpenters Local 209 (Carignan Construction. Co.)*, 355 NLRB 1301 (2010) (same); *Carpenters Local 1506 (AGC San Diego Chapter)*, 354 NLRB 1137 (2010) (same); *Carpenters Locals 184 and 1498 (Grayhawk Development, Inc.)*, 355 NLRB 1117 (2010) (same).

[5] 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 Dev., LLC and 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*

In these circumstances, and given the clear threat to well-established First Amendment principles, we simply do not need to listen to the piper's tune. Because the Board can and should decide this case easily and promptly, under existing law, I dissent.

Dated, Washington, D.C. October 27, 2020

Lauren McFerran, Member

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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).