Sheet Metal Workers International Association, Local 15, AFL–CIO *and* Galencare, Inc., d/b/a Brandon Regional Medical Center *and* Energy Air, Inc. Cases 12–CC–1258, 12–CC–1270, and 12–CG–13

May 26, 2011

SUPPLEMENTAL DECISION AND ORDER

CHAIRMAN LIEBMAN AND MEMBERS BECKER, PEARCE, AND HAYES

This case, on remand from the United States Court of Appeals for the District of Columbia Circuit[1] presents the issue of whether the Respondent Union (Union) violated Section 8(b)(4)(ii)(B) of the Act by: (1) displaying a large inflatable rat at the hospital worksite of a secondary employer; and (2) stationing, at the vehicle entrance of the hospital, a union member who, with two arms outstretched, displayed a leaflet directed at incoming and outgoing traffic. Applying the Board's reasoning in *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (2010), that the display of large stationary banners at secondary employer locations did not violate Section 8(b)(4)(ii)(B), we find that the Union's protest activity similarly did not violate this statutory provision. Accordingly, we shall dismiss the complaint.

Background

On January 9, 2006, the National Labor Relations Board issued a Decision and Order in this proceeding, finding that the Union violated Section 8(b)(4)(ii)(B) by staging a "mock funeral" on public property in front of the hospital.[2] The Board found that the mock funeral, which "consisted of patrolling the entrance to the Hospital," constituted picketing and was unlawfully coercive. In light of this finding, the Board found it unnecessary to decide whether the Union also violated Section 8(b)(4)(ii)(B) by its display of the inflatable rat and by its member's conduct in displaying, with two arms outstretched, a leaflet directed at incoming and outgoing traffic.

The Union filed a petition for review of the Board's Order with the United States Court of Appeals for the District of Columbia Circuit and the Board cross-petitioned for enforcement. On June 19, 2007, the court granted the Union's petition for review and reversed the Board's decision. The court found that the mock funeral was not picketing and was not otherwise coercive. Accordingly, it denied enforcement of the Board's Order, and remanded the case to the Board to decide whether the rat and leaflet display violated Section 8(b)(4)(ii)(B).

On September 4, 2007, the Board notified the parties that it had accepted the remand and invited them to file statements of position. The Union and the General Counsel filed position statements.

Facts

Brandon Regional Medical Center, the secondary employer in this case, commenced construction of an addition to its hospital in 2003. Brandon selected Massey Metals, Inc. (Massey), a sheet metal contractor, to perform HVAC installation on the project. Massey, in turn, used Workers Temporary Staffing (WTS), a labor supply company, to provide employees for the project.

The Union had a primary labor dispute with Massey and WTS over their use of nonunion labor and their alleged payment of wages and benefits below area standards. In furtherance of this primary dispute, the Union sought to persuade Brandon to cease doing business with Massey and WTS by engaging in various protests to publicize the dispute in the vicinity of the hospital.

In January and February 2003, union members mounted an inflated rat balloon on a flatbed trailer and positioned the trailer on public property in front of the hospital. The trailer was stationed approximately 170 feet from one vehicle entrance to the hospital, 145 feet from another entrance, and 100 feet from the hospital's front door. The rat balloon measured about 16-feet tall and 12-feet wide, and had a sign captioned "WTS" attached to the rat's abdomen.

Union members, standing next to the trailer and at vehicle entrances to the hospital, distributed leaflets proclaiming "[t]here's a 'rat' at Brandon Regional Hospital." The leaflet identified WTS as the rat or, more precisely, a "rat employer" and stated that WTS was "undermin[ing] the wages, benefits and other working conditions established by our local labor agreement or otherwise violates workers' rights."

Brendon Holly was one of the union leafletters. Rather than distribute the leaflets, Holly stood at one of the hospital's vehicle entrances for about 2 days in January and held the leaflet out with two arms, directed at visitors driving into and exiting the hospital parking lot.

As this activity was occurring, the hospital's safety and security director asked the Union's organizer what the Union was doing. The organizer replied that the Union was "picketing" and explained that the rat balloon "would probably get the attention of the public more than just regular handbills."

The Union discontinued its display of the rat balloon in late February 2003. It did not return to the hospital until March 15, 2004, when it staged the mock funeral which, as noted, the court found was lawful.

[1] *Sheet Metal Workers' Local 15 v. NLRB*, 491 F.3d 429 (2007).

[2] *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 346 NLRB 199.

The administrative law judge found that the Union's "conduct in inflating a 16-foot-tall rat displaying a banner [w]as a surrogate for a picket," and that Holly's conduct in "holding a leaflet in front of his chest as a placard," directed at motorists entering the hospital, "constituted picketing." Based on his further finding that this conduct was "confrontational" and, hence, "coercive," and that its "object . . . was to have the Hospital cease doing business" with the two primary employers, the judge concluded that the Union violated Section 8(b)(4)(ii)(B).

Analysis

Subsequent to the court's remand of allegations that the rat display and Holly's leaflet display violated Section 8(b)(4)(ii)(B), the Board issued its decision in *Eliason,* clarifying its analytical approach under Section 8(b)(4) when assessing union protest activity directed at a secondary employer. Relying on a consistent line of Supreme Court precedent culminating in *DeBartolo Corp. v. Florida Gulf Coast Bldg. Trades Council*, 485 U.S. 568 (1988), 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." *Eliason*, 355 NLRB No. 159, slip op. at 4. Union protest activity that is merely persuasive is lawful, the Board explained, "even when the object of the activity is to induce the secondary to cease doing business with a primary employer." Id. By contrast, the Board held that protest activity whose "impact [on a secondary employer] owes more to intimidation than persuasion" is not lawful. Id. at 6.

In *Eliason*, the Board found that the union protests directed at secondary employers involved peaceful expressive activity and, therefore, dismissed the complaint alleging a violation of Section 8(b)(4)(ii)(B). As noted, the union in *Eliason* displayed at the locations of secondary employers large stationary banners that protested the companies' business relationships with employers with whom the union had primary disputes. Here, the Union's protest activity took a different form. However, we find that the Board's legal analysis in *Eliason* in finding the banner displays lawful is applicable in determining whether the inflatable rat and Holly's leaflet display violated Section 8(b)(4)(ii)(B).

The first step of the Board's analysis in *Eliason* was to examine whether the banner displays violated the literal terms of Section 8(b)(4)(ii)(B). 355 NLRB No. 159, slip op. at 4. The Board found no evidence of this, noting that there was "no contention that the [Union] threatened the secondary employers or anyone else . . . [or] coerced or restrained the secondaries as those words are ordinarily understood, i.e., through violence, intimidation, blocking ingress and egress, or similar direct disruption of the secondaries' business." Id. Nor did the Board find any indication in the legislative history of Section 8(b)(4)(ii)(B) that Congress intended to prohibit peaceful stationary displays of banners at secondary employers' premises. To the contrary, the Board noted that the "focus of Congress was picketing, not 'peaceful persuasion of customers by means other than picketing'. . . ." Id. at 5, quoting *DeBartolo*, supra, 485 U.S. at 584.

As in *Eliason*, there is no contention here that the inflatable rat or Holly's leaflet display threatened, coerced or restrained the hospital through violence, blocking ingress or egress or similar direct disruption of the hospital's business.[3] Nor is there any indication in the legislative history of Section 8(b)(4)(ii)(B) that Congress intended to prohibit these types of displays which, like the banner displays, were stationary and peaceful.

Recognizing, however, that peaceful expressive activity at a purely secondary site can violate Section 8(b)(4)(ii)(B) if the activity is deemed to be picketing, the Board further considered in *Eliason* whether the banner displays constituted picketing. The Board rejected this contention, finding that the banner displays lacked the essential "element of confrontation [that] has long been central to our conception of picketing for purposes of the Act's prohibitions." 355 NLRB No. 159, slip op. at 6. The Board explained that the "core conduct that renders picketing coercive under Section 8(b)(4)(ii)(B)" is the carrying of picket signs combined with persistent patrolling that "create[s] a physical or, at least, a symbolic confrontation between the picketers and those entering the worksite." Id. The Board found that the banner displays lacked these characteristics of picketing, noting that the banners were held stationary, were located at sufficient distances from the vehicle or building entrances of the secondary sites such that "members of the public and employees wishing to enter the secondaries' sites did not confront an actual or symbolic barrier," and were not "posted" in such a manner that those entering the sites would perceive the individuals holding the banners as "threatening." Id. at 6–7. Accordingly, in the absence of any of those confrontational elements, the Board concluded that an 8(b)(4)(ii)(B) violation could not be found on the basis that the bannering displays constituted picketing. Id.

Similarly here, we conclude that neither the rat display nor Holly's leaflet display constituted picketing. These displays, like the banner displays in *Eliason*, entailed no element of confrontation, as they were stationary and located at sufficient distances from the vehicle and building entrances to the hospital that visitors were not con-

[3] In his brief to the judge, the General Counsel described the rat as "intimidating," but did not explain how or contend that it was coercive for this reason. Rather, he argued, and the judge found, that the rat display was coercive because it was the legal equivalent of picketing. Thus, our dissenting colleague's conclusion that a rat balloon, a proclamation of a "rat employer," and the presence of union agents conveyed a message "unmistakably confrontational and coercive" falls outside the General Counsel's theory of the case and is, in any event, a mere assertion unsupported by evidence or experience.

fronted by an actual or symbolic barrier as they arrived at, or departed from, the hospital.[4] Further, there was no evidence that Holly or the individuals attending the rat physically or verbally accosted hospital patrons; nor does the evidence indicate that they were "posted" near the hospital "in a manner that could have been perceived as threatening" to hospital patrons. *Eliason*, supra, slip op. at 7.[5]

Accordingly, because we find that the rat display and Holly's leaflet display did not involve any confrontational conduct, we reject the judge's finding that these displays constituted picketing. The judge provided no rationale for this conclusion, other than citing the "admission" of the Union's organizer, in response to a hospital official, that the Union was "picketing." *Brandon*, supra, 346 NLRB at 206. But the "mere utterance of that word" in circumstances, as here, which show that the Union's conduct was bereft of any confrontational element, "cannot transform" what is not picketing "into picketing." *Teamsters Local 688 (Levitz Furniture)*, 205 NLRB 1131, 1133 (1973) (rejecting, as evidence of picketing, union handbillers' statements to a company official that they were picketing).

Having concluded that the rat display and Holly's leaflet display did not constitute picketing, we consider, in accord with *Eliason*, whether that conduct nevertheless was unlawfully coercive. 355 NLRB No. 159, slip op. at 10. In *Eliason*, the Board held that a violation of Section 8(b)(4)(ii)(B) may be found if nonpicketing "conduct directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations." Id. As examples of nonpicketing conduct that have been found unlawfully coercive, the Board cited cases involving trash bags hurled into a secondary employer's building lobby, bullhorn messages broadcasted at "extremely high volume" at a secondary's building tenants, and mass gatherings that included the shouting of derogatory names at striker replacements housed inside a secondary employer's motel. Id. at fn. 29. The Board in *Eliason* found no evidence to support a violation under this standard, noting that the "banner holders did not move, shout, impede access, or otherwise interfere with the secondary's operations." Id. at 10.

We similarly find no evidence here to support a finding that the display of the inflatable rat or Holly's leaflet display constituted nonpicketing conduct that was unlawfully coercive. Only six union agents were involved in the rat display, while Holly acted alone, and there is no evidence that their conduct was other than orderly. Like those who held the banners in *Eliason*, neither Holly nor the rat balloon attendants moved, shouted, impeded access, or otherwise interfered with the hospital's operations. The rat balloon itself was symbolic speech. It certainly drew attention to the Union's grievance and cast aspersions on WTS, but we perceive 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 in a manner analogous to the conduct in the cases cited above or otherwise proscribed by Section 8(b)(4)(ii)(B)[6]

Our conclusion that the conduct at issue here was lawful is strongly supported by application of the "constitutional avoidance" doctrine.[7] As explained in *Eliason*, the Board must avoid, if possible, construing the statutory phrase "threaten, coerce or restrain" in a manner that would raise serious problems under the First Amendment. 355 NLRB No. 159, slip op. at 11. There, the Board found "no basis for treating a banner display differently from the other forms of expressive activity that

[4] The judge found, as we noted above, that the rat was located 145 feet from one vehicle entrance to the hospital (at Oakfield Drive), 170 feet from a second vehicle entrance (at Moon Drive), and 100 feet from the front doors of the hospital. *Brandon*, supra, 346 NLRB at 203. The relevant distances with respect to Holly are not indicated in the record. However, photographic exhibits show him standing on the public sidewalk next to the Moon Drive vehicle entrance to the hospital. In his position statement, the General Counsel estimated that Holly was approximately 197 feet from the front doors to the hospital. Compare *Eliason*, 355 NLRB No. 159 slip op. at 2 ("banners were placed between 15 and 1050 feet from the nearest entrance to the secondaries' establishments"). See also *Carpenter Local 1506 (Marriott Warner Center Woodland Hills)*, 355 NLRB No. 219, slip op. at 1 (banners displayed at several secondary sites "less than 15 feet from the entrances to the premises," including one "next to" a vehicle entrance, held lawful in absence of evidence of "any form of confrontation between the banner holders and those entering or exiting the premises").

[5] We reject our dissenting colleague's argument, and his reliance on *Lumber & Sawmill Workers Local 2797 (Stoltze Land & Lumber)*, 156 NLRB 388 (1965), that Holly "plainly was picketing" because he was "posted" at the hospital with his leaflet held out as a placard, rather than distributing them in the manner found lawful in *DeBartolo*. As we explained in *Eliason* (355 NLRB No. 159, slip op. at 7), the mere "posting" of individuals at a secondary site, without patrolling or other accompanying conduct that reasonably can be regarded as confrontational, is not picketing, and to the extent that *Stoltze* and other "posting" cases discussed in *Eliason* held otherwise, we rejected their holdings as inconsistent with *DeBartolo*. Id. at 7–8. Therefore, even accepting our colleague's description of Holly as being "posted" at the hospital, he was not patrolling or engaged in other confrontational conduct that could be deemed picketing.

[6] The dissent repeatedly states that the rat balloon was confrontational and coercive, but makes no effort to explain why this was so. The dissent cannot offer any such explanation because it also acknowledges that the rat image was well understood to be a symbol for "a nonunion contractor" and that its presence "proclaims the presence of a 'rat employer.'" In fact, the dissent would find coercion in this case even without the rat balloon: "stationing of union agents in this manner proximate to a neutral employer's main entrance . . . has been found coercive. . . ." Such a capacious definition of coercion drains the word of all meaning and flies in the face of the Supreme Court's decision in *DeBartolo.*

[7] Our dissenting colleague finds no First Amendment concerns implicated here, characterizing the union conduct as part of an "economic labor dispute" subject to broad regulation by the government, in contrast to "noneconomic political protests." We reject that distinction as inconsistent with the Supreme Court's decision in *DeBartolo*, supra. What matters is not whether the protest in this case was "economic" or "political," but whether it amounted to expressive activity and whether it was coercive.

the Supreme Court has concluded implicate the First Amendment," such as cross-burning,[8] flag burning,[9] and residential lawn signs.[10] Id. at 12. Our conclusion in *Eliason* is strongly supported by the Supreme Court's recent decision in *Snyder v. Phelps*, 562 U.S.__ (March 2, 2011), which affirmed First Amendment protection of picketing by church members of a military funeral, adjacent to a public street, with placards communicating the members' belief that God hates the United States for its tolerance of homosexuality.[11] The Court found the "particularly hurtful" views to be constitutionally protected, in part, because—like the conduct here—the church members displayed their signs ". . . peacefully on matters of public concern at a public place adjacent to a public street." Slip op. at 10. As the Court stated, '"We have repeatedly referred to public streets as the archetype of a traditional public forum,'" adding that "'[t]ime out of mind' public streets and sidewalks have been used for public assembly and debate." Id. (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)). If the First Amendment protects conduct or statements as disturbing to many as this, surely prohibiting an inflatable rat display, with a handbill referring to a "rat employer," would raise serious constitutional concerns. See *Eliason*, supra, slip op. at 13. Like the handbills in *DeBartolo* and the banners in *Eliason*, the rat balloon and Holly handbill displays must be viewed as "expressive activity" protected by the First Amendment. Several courts have held that "the use of a rat balloon to publicize a labor protest is constitutionally protected expression within the parameters of the First Amendment. . . ." *Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005), citing *Operating Engineers v. Village of Orland Park*, 139 F.Supp.2d 950, 958 (N.D. Ill. 2001) ("We easily conclude that a large inflatable rat is protected, symbolic speech").[12] As for Holly's handbill display, *DeBartolo* has already held that peaceful handbilling directed at secondary employers is expressive activity which can not be prohibited without running afoul of the First Amendment.

Last, our dismissal of the complaint is consistent with, and supported by, the D.C. Circuit's finding in this case that the mock funeral display was not unlawful. The court's analysis, which we drew upon in *Eliason*, emphasized the absence of any confrontational aspect of the mock funeral that would support a finding of proscribed coercion or restraint. As we have discussed, the inflatable rat display and Holly's display were similarly nonconfrontational.

The dissent nevertheless contends that the rat display was "tantamount to picketing" and unlawfully coercive because it served as a "signal to third parties" that there was an "invisible picket line that should not be crossed." This argument was neither alleged in the complaint nor argued by the General Counsel, and we reject it in any event on the merits.[13]

First, "signals" by protesters to third parties in a secondary labor dispute are not unlawful unless the third parties to whom the "signal" is directed are employees of secondary employers, as opposed to the general public, and the signal is to cease work. Thus, "signal picketing" is a term of art which, as we explained in *Eliason*, involves union agents conveying implicit directions or instructions to union members, including employees of a secondary employer, that induce the employees to cease work or refuse to perform services at a secondary employer's business. *Eliason*, supra, 355 NLRB No. 159, slip op. at 9. See also *Carpenters Southwest Regional Council Locals 184 & 1498 (New Star)*, 356 NLRB No. 88, slip op. at 3 (2011). While Section 8(b)(4)(i)(B) is violated where such facts are proven, "signals" from union agents directed only at the public or customers of a secondary business, even if they ask customers to boycott the secondary business, do not constitute signal picketing, and do not violate Section 8(b)(4)(i)(B).

There is no 8(b)(4)(i)(B) allegation in this case that the Act was violated by signal picketing, nor does the evidence support such a violation. The Union did not use the rat display as any form of "signal" to employees of Brandon or any other employer to cease work.[14] Rather, it was used to symbolize the primary employer WTS as a "rat contractor" that was undercutting area labor standards, and the "third parties" to whom this message or "signal" was sent were members of the public, including hospital visitors.

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[8] *Virginia v. Black*, 538 U.S. 343 (2003).

[9] *Texas v. Johnson*, 491 U.S. 397 (1989).

[10] *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

[11] The signs displayed read: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You." Id., slip op. at 8. As Chief Justice Roberts stated:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Id. Slip op. at 15.

[12] See also *State v. DeAngelo*, 963 A.2d 1200, 1207 (N.J. 2009) where the New Jersey Supreme Court found, relying on *City of Ladue*, supra, that a union's display of an inflatable rat as part of a labor dispute at a secondary location is a constitutionally protected "use of nonverbal eye-catching symbolic speech [that] represents a form of expression designed to reach a large number of people."

[13] The dissent also cites an alleged threat to picket before the primary employers began work on the site, but there is no allegation in this case of an unlawful threat. Even if there was a threat and the threat used the term "picket" to describe the conduct at issue here, we would not find that it transformed the nonpicketing protest into picketing, for the reason we explained above.

[14] As in *Eliason* and *New Star*, there is no evidence in this case that any employee ceased work as a result of the rat display.

Our dissenting colleague asserts that we have misconstrued his position and that the rat display was unlawful, not because it involved signal picketing, but because the "signal" effect of the display was coercive in the "same context" that the term was used by Justice Stevens in his concurring opinion in *NLRB v. Retail Store Employees, Local 1001*, 447 U.S. 607, 619 (1980) (*Safeco*). As explained above, however, there was no picketing here, in contrast to *Safeco*, which involved traditional, ambulatory picketing.[15] Furthermore, as is also explained above, there was no other form of coercion here within the meaning of the prohibition in Section 8(b)(4)(ii)(B). If the dissent is not using the word "signal" to suggest that the rat balloon unlawfully sent a signal to employees of the secondary employer to strike, we fail to understand how the rat balloon's function as a "signal" rendered it coercive. If the rat balloon sent a "signal" to consumers that a nonunion contractor was working in the hospital and that the union considered the contractor to be analogous to a rat, such a signal is lawful. Even if, as the dissent asserts, the Union's intent in sending such a signal was to induce consumers "to take the kind of action that traditional picket lines are intended to evoke"—i.e., not to patronize the hospital – such a signal is lawful. Such a signal becomes unlawful only if accompanied by coercion. The dissent labels the rat balloon coercion, but cites no evidence that anyone entering or exiting the hospital was coerced by the balloon and presents no explanation of why any such person would reasonably have been so coerced. Labeling the rat balloon a signal does not supply the missing evidence or explanation.

This conclusion is not altered, as our colleague contends, by the fact that the secondary employer here is a hospital, whose patients and visitors undoubtedly include physically and emotionally fragile individuals. As explained above, we perceive nothing in the location, size or features of the balloon that was likely to frighten those entering the hospital, including patients and their families. Moreover, given that the Court of Appeals found in this case that the mock funeral, which included a costumed "Grim Reaper" and the display of a coffin, could not "realistically be deemed coercive" even to "someone visiting a dying relative," 491 F.3d at 439, the Court would certainly not sustain a finding that the display of a rat balloon in similar circumstances coerced anyone.[16]

The dissent labels the 16-foot tall balloon at issue in this case a "rat colossi." It 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)(B), but such was not the case here.

Conclusion

Applying the analytical framework set forth in *Eliason*, we conclude that the display of an inflatable rat and Holly's display of a union leaflet did not violate Section 8(b)(4)(ii)(B). Accordingly, we reverse the judge's findings of violations and dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 26, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

Long ago, the administrative law judge presiding over this case correctly found that the Respondent Union engaged in unlawful secondary boycott activity by its display of a 16-foot tall, 12-foot wide rat balloon, accompanied by union members, near the main vehicle entrance of a neutral employer—an acute care hospital—and by posting at another entrance a union agent holding a leaflet to his chest like a placard.[1] My colleagues now invoke and extend their recent decision in *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*[2] to reverse the judge and further depart from the scope of the secondary coercion of neutral employers that Congress in-

[15] In concurring with the Court plurality that the "picketing plainly violate[d] the statutory ban on the coercion of neutrals," 447 U.S. at 615, Justice Stevens distinguished handbilling from picketing and explained that the reason why picketing, but not handbilling, may usually be prohibited as coercive under Sec. 8(b)(4)(ii)(B) is because the mere "presence of a picket line" induces action by those coerced by it. Id. at 619 (quoting *Bakery Drivers v. Wohl*, 315 U.S. 769, 776–777 (1942)(Douglas, J., concurring). Specifically it "calls for an automatic response to a signal"— the signal being not to cross the picket line. Id. Here, the rat balloon did not constitute a picket line for the reasons that we explained above, and, therefore, no person was confronted, as in *Safeco*, by a "signal" that could have coerced him or her from "crossing" a picket line.

[16] Our colleague quotes from *NLRB v. Baptist Hospital*, 442 U.S. 773, 783 fn. 12 (1979), in support of his argument that Sec. 8(b)(4)(ii) should be applied differently in a hospital setting. But it is important to note that *Baptist Hospital* concerned union solicitation by hospital employees in the sitting rooms and corridors adjacent to patients' rooms, operating rooms, and other treatment areas. Here, the peaceful, expressive conduct took place on public property beyond the hospital's grounds.

[1] *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 346 NLRB 199, 205–206 (2006), enf. denied in other part sub nom. *Sheet Metal Workers Local 15 v. NLRB*, 491 F.3d 429 (D.C. Cir. 2007).

[2] 355 NLRB No. 159 (2010).

tended to prohibit through Section 8(b)(4)(ii)(B) of the Act. As in *Eliason & Knuth*,[3] I dissent.

Relevant Facts and Procedural History

As summarized in the majority opinion, Brandon selected Massey Metals to perform sheet metal work in connection with an expansion project at the hospital. Massey, in turn, contracted with a labor supply company, WTS, for temporary help. The Union objected to the benefits and labor practices of Massey and WTS, and engaged in various actions intended to compel Brandon to cease doing business with them. Specifically, even before work on the expansion commenced, the Union threatened "to establish a massive picket line" if Brandon used nonunion contractors on the project. The Union subsequently parked a flatbed trailer, loaded with the giant rat balloon, near the main driveway entrance to Brandon's hospital complex. A large banner reading "Workers Temporary Staffing" was affixed to the rat. Six or seven union agents stood alongside the trailer with leaflets. Persons travelling in an eastbound direction to the hospital driveway entrance by car or foot would have to pass directly by this protest.[4]

Union Organizer McIntosh conceded this activity was "picketing" when he told a Brandon representative that his goal was to "target" the public and patients and that "he was there picketing because one of [the hospital's] subcontractors was not union or he had some kind of problem with the sheet metal contractor." Union Business Agent Jeske acknowledged that "among construction workers, [a] rat is known as being a nonunion contractor."

In addition to the rat balloon picketing, union agent Brendon Holly was posted on two separate occasions at one of the hospital driveway entrances holding a leaflet with both hands in front of his chest at the eye level of drivers in passing vehicles. The leaflet asserted that there was a "rat" at Brandon, identified the "rat" as WTS, claimed WTS paid substandard wages and benefits, and asserted that if this was tolerated it "will undermine the living standards of our entire community." The leaflet included a cartoon of a rat in a patient's room with a person standing behind the rat sweeping up its droppings.

After Brandon filed unfair labor practice charges with the Board concerning this conduct, the Union settled the charges and the conduct ceased—for a few weeks. Despite the settlement, however, the Union staged a mock funeral procession in front of the hospital while distributing leaflets which asserted that going to Brandon should not be a "grave affair" and describing medical malpractice lawsuits filed against the hospital in which a patient had died. The leaflets did not mention any labor dispute, but instead stated that they were a "public service message" from the Union.

A Board panel unanimously determined that the mock funeral procession violated Section 8(b)(4)(ii)(B).[5] In light of this disposition, the Board did not reach the issue of whether the Union also violated the Act by displaying the inflated rat and by Holly's conduct described above. The D.C. Circuit denied enforcement of the Board's unfair labor practice finding as to the mock funeral procession and remanded the case "for the Board to consider the issues it did not reach in the Decision and Order…"[6] Thus, those issues are now before us for decision.[7]

Analysis

Section 8(b)(4)(ii)(B) protects neutral employers, employees, and consumers from "coerced participation in industrial strife." *NLRB v. Retail Clerks Local 1001 (Safeco),* 447 U.S 607, 617–618 (1980) (Blackmun, J, concurring in part). Its proscription "broadly includes 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." *Carpenters Kentucky District Council (Wehr Constructors),* 308 NLRB 1129, 1130 fn. 2 (1992) (internal quotation omitted). cert. denied 341 U.S. 947 (1951). Further, there is no constitutional barrier to prohibition of such secondary boycotts and picketing. As summarized in *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 912 (1982),

> This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834; *NLRB v. Retail Store Employees*, 447 U.S. 607, 100 S.Ct. 2372, 65 L.Ed.2d 377. The right of business entities to "associate" to suppress competition may be curtailed. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637. Unfair trade practices may be restricted. 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." *NLRB v. Retail Store Employ-*

[3] Id. at slip op. 15—26 (Members Schaumber and Hayes dissenting).

[4] The trailer and rat balloon were stationed 145 feet, or less than 10 car lengths, west of the main hospital driveway entrance. At this point, drivers preparing to turn into the entrance would already be slowing their vehicles.

[5] *Sheet Metal Workers Local 15*, supra at 199–200.

[6] *Sheet Metal Workers Local 15 v. NLRB*, supra at 440.

[7] The court's opinion, while law of the case as to the issues the court actually considered and decided, does not control the disposition of these issues, which the court remanded for the Board to consider in the first instance. *NLRB v. Goodless Bros. Electric Co.,* 285 F.3d 102, 107 (1st Cir. 2002) (stating rule); *NLRB v. Can-Am Plumbing, Inc.,* 340 Fed.Appx. 354 (9th Cir. 2009) (law of the case did not preclude consideration by the Board in first instance of issue not addressed by court of appeals).

> *ees, supra*, at 617-618, 100 S.Ct., at 2378 (BLACKMUN, J., concurring in part). See *Longshoremen v. Allied International, Inc.*, 456 U.S. 212, 222-223, and n. 20, 102 S.Ct. 1656, 1662-1663, and n. 20, 72 L.Ed.2d 21.[8]

Considered in the abstract, or viewed from afar, the display of a gigantic inflated rat might seem more comical than coercive. Viewed from nearby, the picture is altogether different and anything but amusing. For pedestrians or occupants of cars passing in the shadow of a rat balloon, which proclaims the presence of a "rat employer" and is surrounded by union agents, the message is unmistakably confrontational and coercive. Indeed, from a legal standpoint, the rat display merely adds to the objectively coercive nature of the union demonstration. By itself, the stationing of union agents in this manner proximate to a neutral employer's main entrance was, prior to the issuance of *Eliason & Knuth,* regarded as picketing even in the absence of ambulation under longstanding court and Board precedent,[9] and as such has been found coercive and violative of Section 8(b)(4)(ii)(B) when used for the proscribed "cease doing business objective."[10]

Irrespective of any statement by union agents, I agree with the observation by the General Counsel, both in the Advice Memorandum recommending issuance of the complaint in this case and in the posthearing brief to the judge, that "[t]he union's use of an inflatable rat, a well known symbol of labor unrest, is tantamount to picketing."[11] Such displays, now frequent in labor disputes, constitute a signal to third parties that there is, in essence, an invisible picket line that should not be crossed. The union's intent in sending this signal is to induce those confronted by the rat and attending union agents to take the kind of action which traditional picket lines are expected to evoke. In other words, the predominate characteristic of this union activity is, like picketing, to intimidate by conduct, not to persuade by communication.[12]

Moreover, this conduct took place at an acute care hospital, where its coercive impact would be magnified by the relative fragility of the patient and visitor audience exposed to it. As the Supreme Court has observed,

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family— irrespective of whether that patient and that family are labor or management oriented— need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.[13]

Like the judge, I would also find that Holly's actions in holding the leaflet out as a sign visible to drivers in passing vehicles plainly was picketing. *Lumber & Sawmill Workers Local 2797 (Stolze Land & Lumber),* 156 NLRB 388 (1965) (recognizing that picketing occurs when union posts agent at the approach to place of business to accomplish purpose of keeping employees or customers away). He stood at the entrance to the facility holding a leaflet like a placard at chest level thrust out for passers-by to read, despite having been cautioned to avoid such conduct and to limit himself to traditional handbilling. That conduct is no less confrontational than wearing a placard, which the Board has long recognized to be the equivalent of carrying a picket. *Sheet Metal Workers Local 19 (Delcard Associates),* 316 NLRB 426,

[8] Contrary to the majority, First Amendment cases including the recently decided *Snyder v. Phelps,* 562 U.S. __ (2011), do not support their position that the Union's conduct in this case must be found lawful in order to avoid a potential Constitutional conflict. Those cases involve the question of what content neutral, time, place, and manner restrictions a state may place on noneconomic political protests. The distinction between such cases and government regulation of economic labor disputes was expressly recognized in *Claiborne Hardware Co.,* 458 U.S. at 913: "While States [and the Federal government] have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case." The majority's argument that this distinction is inconsistent with *DeBartolo Corp. v. Florida Gulf Coast Bldg. Trades Council*, 485 U.S. 568 (1988), should be directed to the Supreme Court, which apparently failed to perceive any inconsistency. See also *NLRB v. Retail Store Employees Local 1001*, 447 U.S. 607 (1980) (*Safeco*).

[9] See *Laborers Local 389 (Calcon Construction)*, 287 NLRB 570, 573 (1987), and cases cited there.

[10] Id. at 573–574. In order to find a violation of Sec. 8(b)(4)(ii)(B), there must also be proof that a union has used unlawful coercive means to achieve the proscribed unlawful cease doing business objective. The majority does not address whether the conduct at issue in this case had the proscribed secondary objective of forcing Brandon to cease doing business with WTS and Massey. For the reasons stated in the judge's decision, 346 NLRB at 205, I would find that the testimony of the Respondent's witnesses clearly establishes this objective.

[11] *Sheet Metal Workers International Association, Local 15,* 12–CC–1258, 2003 NLRB GCM LEXIS 62 (April 4, 2003); General Counsel's posthearing brief p. 10.

[12] Although I refer to the "signal" effect of the rat display, I do so in the same context as that term was used by Justice Stevens in his concurring opinion in *Safeco,* 447 U.S. at 619, and earlier suggested by Justice Douglas' concurring opinion in *Bakery & Pastry Drivers & Helpers Local 801 v. Wohl,* 315 U S 769, 819—820 (1942)("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.") As should be obvious to the majority, signaling in this context has a different meaning than when used as a term of art in 8(b)(4)(i)(B) cases involving signals to induce or encourage union members not to cross picket lines. The majority is simply mistaken in contending that I rely on a theory of violation under that precedent. I did not do so in the joint dissent in *Eliason & Knuth*, (see 355 NLRB No. 159, slip op. at 20 fn. 24), and I do not do so here.

The majority is similarly mistaken in contending that the General Counsel has not made the argument set forth here. On the contrary, the General Counsel's brief to the judge expressly makes this argument supra at 9–12.

[13] *NLRB v. Baptist Hospital,* 442 U.S. 773, 783 fn. 12 (1979) (internal quotation omitted):

437–438 (1995), enfd. in pert. part 154 F.3d 137 (3d Cir. 1998).

In finding this conduct lawful, my colleagues assert "there is no contention here that the inflatable rat or Holly's leaflet display threatened, coerced or restrained the hospital through violence, blocking ingress or egress or similar direct disruption of the hospital's business." While accurate, this assertion is beside the point. The complaint in this case does allege that the Union threatened, restrained, or coerced Brandon by the conduct described above. And the well-established meaning of those statutory terms, prior to the majority's decision in *Eliason,* was that they included the confrontational posting of a union agent at a neutral employer's premises – regardless of whether the agent patrolled the site or carried a sign affixed to a stick. *Jeddo Coal*, supra, 334 NLRB at 686 ("neither patrolling 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."); *Mine Workers (New Beckley Mining),* 304 NLRB 71 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992) (picket signs or placards not essential); *Stolze,* supra, 156 NLRB 388 (patrolling not essential). As shown, that is precisely what occurred in this case.[14]

Only under the re-definition of Section 8(b)(4) authored by the majority in *Eliason* could it be found that the disputed conduct here is not picketing, or its coercive equivalent, simply because there was no carrying of picket signs combined with "persistent patrolling," and was not otherwise coercive because "neither Holly nor the rat balloon attendants moved, shouted, impeded access, or otherwise interfered with the hospital's operations." Moving from giant banners in *Eliason* to rat colossi mounted on trailers in this case, my colleagues have quite literally expanded the physical mass that unions may erect to confront and deter customers from entering a neutral employer's premises in order to coerce that employer to cease doing business with the primary employer target of a labor dispute. Clearly, these means of protest owe more to intimidation than persuasion. For the reasons stated above and in the joint dissent in *Eliason,* I disagree that the majority's restrictive interpretation of the Act's prohibition of secondary coercion is compelled by the text of the Act, its legislative history, and any valid concerns about a conflict with First Amendment protections. Accordingly, I would find that the Respondent's conduct unlawfully coerced Brandon within the meaning of Section 8(b)(4)(ii)(B).

Dated, Washington, D.C. May 26, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

[14] My colleagues cite *DeBartolo*, supra, in support of their determination that Holly's actions were lawful. According to the majority, "*DeBartolo* has already held that peaceful handbilling directed at secondary employers is expressive activity which can not be prohibited without running afoul of the First Amendment." Insofar as the majority suggests that *any* conduct involving a handbill was held lawful in *DeBartolo,* I respectfully disagree. *DeBartolo* only addressed whether Sec. 8(b)(4)(ii)(B) proscribed peacefully "distributing handbills" urging customers not to patronize a shopping mall's tenants until the mall owner promised that all mall construction would be performed only by contractors that paid "fair wages." Id. at 570. At issue here, of course, is not the distribution of handbills by Holly or anyone else, but Holly's use of a leaflet as a placard. The Court did not address conduct of this character in *DeBartolo.*