UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150, A/W INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL−CIO

and Case 25−CC−228342

LIPPERT COMPONENTS, INC.

Raifael Williams and *Tiffany Limbach, Esqs.,*
for the General Counsel.
Allyson Werntz, Brian Easley, and *Elizabeth Bentley, Esqs.*
(Jones Day),
for the Charging Party.
Charles R. Kiser, Esq.
(International Union of Operating Engineers, Local 150),
for the Respondent.

DECISION

STATEMENT OF THE CASE

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

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

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

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

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

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

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

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

All parties agree that the Respondent has been involved in a labor dispute with MacAllister Machinery, Inc. (MacAllister) (GC Exh. 1(j)); however, the parties dispute whether the Respondent has engaged in a labor dispute with either Lippert or Thor Industries (Thor). Lippert supplies RV components to the mobile home and marine industries. (Tr. 17). Lippert rents some of its equipment from MacAllister. (Tr. 18). Thor is one of Lippert's largest customers and purchases approximately $800 million worth of goods yearly from Lippert. (Tr. 19).

Thor hosted its annual RV tradeshow in Elkhart, Indiana from around September 24, 2018, through September 27, 2018,[3] at various locations around the city. The tradeshow provides a platform for approximately eight to ten RV suppliers to show their products, primarily to other

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

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

dealers. (Tr. 18). Lippert and Thor showed their products and services at the RV Hall of Fame at 21565 Executive Parkway in Elkhart, Indiana and the trade show spanned the grassy area on either side of the Hall of Fame. (Tr. 19−20).

B. Events of September 24 through 27

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

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

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

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

ANALYSIS

A. Overview of the Law

In 1988, the Supreme Court held that peaceful handbilling outside mall stores urging customers not to patronize the establishments did not violate the Act. *DeBartolo Corp. v. Florida Gulf Coast Bldg.*, 485 U.S. 568 (1988). The Court cited *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964) (*Tree Fruits*), for the proposition that Congress did not intend, in Section 8(b)(4)(B), to proscribe all peaceful consumer picketing at secondary sites. Id. at 578. The union in *DeBartolo* had a primary dispute with a construction company for allegedly paying substandard wages and fringe benefits. DeBartolo, a mall owner, contracted with the construction company to build a department store in the mall. Id. at 570−571. In response, union members handed out fliers at all four entrances to the mall informing the public of the dispute and seeking to use publicity to pressure DeBartolo to hire companies that pay fair wages. Id. The Court ultimately found that "more than mere persuasion is necessary to prove a violation of § 8(b)(4)(ii)(B)" and that "the loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do." Id. at 578 and 580. In *DeBartolo*, the union did not have picket signs nor did the union members patrol. The Court found that this was not tantamount to picketing and ultimately found that peaceful handbilling of a secondary employer is protected by the First Amendment and not proscribed by Section 8(b)(4) of the Act. Id. at 571.

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

In 2011, the Board further extended the law and held that displaying a large inflatable rat outside the workplace of a secondary employer is not a violation of the Act. *Brandon Regional Medical Center* (*Brandon II)*, 356 NLRB 1290 (2011). In *Brandon II*, a medical facility hired two construction contractors to build an addition to the hospital; however, the two contractors were engaged in a labor dispute with the union regarding use of nonunion labor and insufficient wages. Id. at 1290. In addition to stationing a union member holding out a leaflet between two outstretched arms aimed at the incoming and outgoing traffic at the hospital's entrance, the union placed an inflated rat balloon on a flatbed trailer parked outside the hospital, approximately 100 feet from the front door. Id. The inflatable rat was approximately 16 feet tall and 12 feet wide

with an attached sign reading "WTS". Id. (WTS stood for "Workers Temporary Staffing," one of the primary contractors). The Board affirmed past doctrine and "found no evidence here to support a finding that the display of the inflatable rat. . . constituted nonpicketing conduct that was unlawfully coercive." Id. at 1292.

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

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

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

Section 2(9) of the Act provides a definition of a labor dispute which includes "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 29 USC § 152(9). Read in its entirety, the definition states that the relation of employer and employee is not determinative or required for a primary labor dispute to exist; however, it requires that a controversy exists regarding terms and conditions of employment. The Respondent argues that this definition allows it to establish a primary dispute between itself and Lippert and Thor; this is incorrect. Although the statute specifies that proximate relation is not required, the Respondent has not shown that a controversy exists between itself and Lippert or Thor involving terms or conditions of employment. I find no record evidence that the labor dispute between the Respondent and MacAllister has in anyway affected the terms and conditions of employees working for or at Lippert or Thor.

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

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

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

Here, the Respondent placed two stationary banners on a public street corner outside an RV trade show. Like the banners in *Eliason & Knuth*, the banners informed the public of a dispute and in no way caused a confrontation so as to create a prohibited picketing situation. *Eliason & Knuth*, supra at 789. The banners here, approximately 3.75 feet high by 8 feet long, are significantly smaller than the banners in the other three cases where the Board found the banners not to be symbolic barriers or confrontational. *Eliason & Knuth*, supra at 789 (banners were 3–4 feet high and 15–20 feet long); *New Star*, supra at 624 (banners were 4 feet high and 20 feet long); *Westgate Las Vegas*, 363 NLRB No. 168, slip op. at 2 (2016) (banners were 4 feet high and 20 feet long). Further, the two employees who monitored the banners did not march or carry picket signs; they merely sat beside the display. I find that here, as in *Eliason & Knuth*, the usage of stationary banners does not constitute proscribed picketing.

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

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

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

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

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

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

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

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

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

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

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

Signal picketing is "'activity short of a true picket line, which acts as a signal that sympathetic action' should be taken by unionized employees of the secondary or its business partners." *Eliason & Knuth*, supra at 804–805 (citing *Electrical Workers Local 98* (*Telephone Man*), 327 NLRB 593 fn. 3 (1999) (finding that a union representative standing at the primary gate with a sign revealing a message to the primary employer constituted signal picketing). This type of picketing is generally directed at other union employees or nonunion employees of the secondary employer and suggests that they too cease work. Id. at 805. In proving a violation of

8(b)(4)(i), "the evidence must prove that the alleged conduct 'would reasonably be understood by the employees as a signal or request to engage in work stoppage against their own employer.'" *Carpenters Southwest Regional Council Locals 184 & 1498* (*New Star)*, 356 NLRB 613, 616 (2011) (finding that banner displays using the words "labor dispute" was not a signal to employees to cease work). The evidence must also prove that the object of conduct is to compel the secondary employer to cease doing business with the primary employer. "Unless both of those elements are demonstrated, no violation of the Act may be found." Id. at 615

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

The General Counsel has not presented sufficient evidence to show that the two employees or the display itself were attempting to communicate to employees of either Lippert or Thor that they should cease their work. The banners first stated that safety violations had been found and second, announced shame on Lippert for using MacAllister a "rat contractor." Neither of these statements suggests or alludes to the fact that employees should cease their work. The Board noted in *Eliason & Knuth*, that in the 11 cases that the Board decided involving "89 banner displays at diverse locations ranging from restaurants to construction sites, no evidence has been offered that *any* employee responded to any banner by ceasing work." Supra at 418. Again, in this case, there is no evidence that any employee, unionized or not, ceased working. If Respondent was trying to signal the secondary employees to cease working, I would think that they would have found a more fruitful signal in the intervening 7 years between the *Eliason & Knuth* decision and the displays at issue in this case. Even if there had been evidence that some employees ceased working after viewing the display, this alone would not establish a violation of the Act because the evidence does not support a finding that the secondary employees received a "signal" from Respondent to stop working, as opposed to merely have chosen to act on their own based upon the information provided.

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

F. Was the Conduct Protected by the First Amendment?

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

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

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

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

[4] I note that if federal court precedent was controlling, the bulk of the recent precedent would be in Respondent's favor. *Construction and General Laborers' Union No. 330 v. Town of Grand Chute*, 915 F.3d 1120, 1123 (7th Cir. 2019) (". . .there is no doubt that a union's use of Scabby to protest employer practices is a form of expression protected by the First Amendment"); *King v. Construction & General Building Laborers' Local 79*, Docket No. 1:19-cv-03496 (2019 WL 2743839) (E.D.N.Y. Jun 13, 2019) (Denying temporary restraining order and preliminary injunction requesting cessation of picketing and removal of inflatable creatures); *Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005) ("In our view, there is no question that the use of a rat balloon to publicize a labor protest is constitutionally protected expression within the parameters of the First Amendment").

> Appeals was plainly correct in holding that the Board's construction would require deciding serious constitutional issues. Supra at. 576.

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

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

Respondent's banners convey information to the public regarding events which have transpired, including the fact that OSHA found safety violations against MacAllister. There is no evidence that this claim is false. The banners here, unlike those in *Eliason & Knuth*, do not instruct the public to stop patronizing a business but rather inform the public of an event which occurred and of a business relationship between employers involved. One of the banners in *Eliason & Knuth* gave specific instructions not to patronize the secondary but was still found to be protected. Therefore, I find that the banners in this case must also be protected under the First Amendment.

CONCLUSIONS OF LAW

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

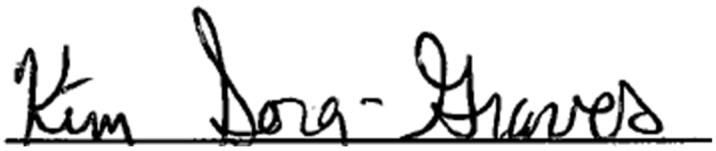
REMEDY

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[5]

ORDER

The complaint is dismissed in its entirety.

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



Kimberly Sorg-Graves
Administrative Law Judge

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