IS A GIANT INFLATABLE RAT AN UNLAWFUL SECONDARY PICKET UNDER SECTION 8(b)(4)(ii)(B) OF THE NATIONAL LABOR RELATIONS ACT?

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INTRODUCTION

In January of 2003, several members of the Sheet Metal Workers’ International Association, a labor union, stood in front of Brandon Regional Medical Center in Brandon, Florida and gave out handbills to passersby.1 The handbills described a company called Workers Temporary Staffing (WTS). WTS employed non-union workers who were performing renovations at the medical center.2 The handbills called WTS a “rat employer,” that is, a company that “undermines wages, benefits, and . . . working conditions in the area.”3 The handbills warned that local living standards would drop if the community tolerated companies like WTS.4

Brandon Medical Center filed a charge with the National Labor

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1 Brandon Reg’l Med. Ctr., 2004 NLRB LEXIS 688, at *13-15 (Dec. 7, 2004), aff’d on other grounds, 346 N.L.R.B. No. 22 (Jan. 9, 2006). There seems to be some disagreement about exactly how many people were involved. The opinion cited here mentions that six members set up the rat, then started handbilling. Id. at *13. An advice memorandum from the NLRB, however, says that only two or three members were giving out handbills at any given time. Sheet Metal Workers Local 15 (Brandon Regional Hospital), NLRB Advice Memorandum, at 3 n.4 (Apr. 4, 2003), http://www.nlrb.gov/nlrb/shared_files/admemo/admemo/12-cc-1258(04-04-03).pdf. For an explanation of NLRB advice memoranda, see infra note 128.

2 Brandon Reg’l Med. Ctr., 2004 NLRB LEXIS 688, at *13. WTS supplied temporary employees to Massey Metals, a non-union contractor that was working at the site. Id. at *11.

3 Id. at *14-15. There is some disagreement about the true meaning of the term “rat” in a labor context. For example, the NLRB General Counsel has pointed out that the term has been used to describe a “scab,” that is, a worker who refuses to take part in a strike or replaces a striking worker. Press Release, NLRB, NLRB General Counsel Arthur Rosenfeld Issues Report on Recent Case Developments (May 2, 2003), available at http://www.nlrb.gov/nlrb/press/releases/r2488.asp. Whether or not the term refers to a worker or an employer, there is at least general agreement that the image of a rat, particularly a large rubber inflatable one, is associated with a labor dispute. Id

Relations Board (NLRB), claiming that the union had committed an unfair labor practice. The NLRB initiated proceedings against the union that led to a hearing before an Administrative Law Judge (ALJ). The ALJ held that the union had committed an unfair labor practice by engaging in unlawful “secondary picketing.” This ruling was not only

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5 *Id* at *16-17*. The National Labor Relations Board administers the National Labor Relations Act (NLRA). The NLRA defines activities that unions and employers are forbidden from engaging in; such activities are known as unfair labor practices. *Nat’l Labor Relations Bd., The National Labor Relations Board and You* (1999), available at http://www.nlrb.gov/nlrb/shared_files/brochures/engulp.asp. The NLRB is comprised of two major, separate components: A five-person Board (Board) whose members are appointed by the President, and a separate General Counsel, also appointed by the President. See About the NLRB, http://www.nlrb.gov/nlrb/about/ (last visited Nov. 14, 2006). For an explanation of the General Counsel’s role, see infra note 14. The Board acts as a quasi-judicial body, deciding cases based on administrative proceedings. NLRB website, About the NLRB, http://www.nlrb.gov/nlrb/about/. The NLRB does not begin investigations on its own initiative; an aggrieved party has to file a charge with the NLRB in order for it to begin investigating an alleged unfair practice. *Id.* In *Brandon Regional Medical Center*, the medical center, rather than WTS, filed the charge because it was the object of the secondary campaign. WTS, as a primary business, would probably not have had grounds to file a charge. For an explanation of the terms “secondary” and “primary,” see infra note 8.

6 The Board appoints and, subject to certain statutes, exercises authority over administrative law judges in the NLRB’s Division of Judges. *Nat’l Labor Relations Bd., National Labor Relations Board: Organization and Functions* § 201, available at http://www.nlrb.gov/nlrb/legal/manuals/rules/organization.asp. The NLRB’s procedure for handling unfair labor practice charges is as follows: Once the charge is filed, the Board will make a preliminary determination of whether or not there is enough evidence of a violation to warrant an investigation. If the Board does go on to conduct an investigation and finds sufficient evidence of a violation, it will ask the violator to remedy the violation voluntarily. If the violator does not comply, the board, through its local regional office, will file a formal complaint, and a hearing will be held before an ALJ. See *Nat’l Labor Relations Bd., supra* note 5. If the parties do not file exceptions to the ALJ’s decision, then the ALJ’s decision becomes a decision of the Board; where a party does file exceptions, the Board will review the record and either accept, modify, or reject the ALJ’s order. 29 C.F.R. § 101.12 (2006). Board decisions can be appealed to a U.S. Court of Appeals and, ultimately, to the Supreme Court. About the NLRB, *supra* note 5; 29 C.F.R. § 101.14 (2006).


8 “Secondary picketing” occurs as follows: When a union has a direct dispute with a particular employer, in this case, WTS, that employer is known as the “primary.” If a union is trying to get the primary to allow its employees to join the union, it may lawfully picket the primary. If the primary still resists the union’s demands, the union might decide to put pressure on entities that are engaged in business with the primary. In this case, the union campaigned against the medical center in the hope that it would then pressure WTS to come to an agreement with the union. The medical center is known as a “secondary” because it is not in a “primary” dispute with the union; that is, the union is not trying to recruit its employees. See Archibald Cox et al., *Labor Law* 630-31 (13th ed. 2001). In this case, the primary and secondary were at the same location, and so the union might arguably have been picketing the primary. However, under the NLRB doctrine that governs such situations, the union would have had to conduct its campaign differently—for example, it would have had to place the inflatable rat at the entrance that the primary, WTS, was using, rather than the main customer entrance to the medical center. The union did not do this because its purpose was not to picket the primary employer but rather to communicate to customers. Thus, the ALJ considered the union’s actions as a secondary campaign. See *In re Sailor’s Union of the Pacific* (Moore Dry Dock Co.), 92 N.L.R.B. 547 (1950); Howard Lesnick, *The Gravamen of the Secondary Boycott*, 62 Colum. L. Rev. 1363 (1962).
based on the union members’ handbilling; that activity, by itself, would not have been considered picketing.\textsuperscript{9} The ALJ found that the union members had been picketing because, in addition to handbilling, the union members set up a sixteen-foot-tall inflatable rat.\textsuperscript{10} The rat was twelve feet wide at the base, wore a sign that read “Workers Temporary Staffing,”\textsuperscript{11} and sat “upright, smiling, with a cigar in its mouth.”\textsuperscript{12}

This Note addresses the key argument underlying the ALJ’s decision: That it is unlawful for unions to use inflatable rats to promote secondary boycotts because the rats engage in prohibited picketing.\textsuperscript{13} Calling an inflatable animal a picketer may seem whimsical, but this reasoning is a serious matter for labor unions. The NLRB’s General Counsel (General Counsel)\textsuperscript{14} has recently endorsed this reasoning and has filed charges against at least one other union that has used inflatable rats.\textsuperscript{15} If the General Counsel’s reasoning prevails, unions will lose a weapon they have used effectively in their efforts to win back lost strength by gaining new members.\textsuperscript{16}

\textsuperscript{9} This will usually be the case, since the Supreme Court has specifically ruled that “peaceful handbilling” does not violate the law that regulates secondary picketing. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (\textit{DeBartolo II}), 485 U.S. 568, 583-84 (1988).

\textsuperscript{10} \textit{Brandon Reg’l Med. Ctr.}, 2004 NLRB LEXIS 688, at *30. The union did engage in other behavior at other times during its campaign at the medical center; for example, in March of 2003 it conducted a mock funeral service that the ALJ also found to be unlawful. \textit{Brandon Reg’l Med. Ctr.}, 2004 NLRB LEXIS 688, at *18. However, the ALJ held that the rat alone, or at least in conjunction with handbillers, was a “surrogate picket.” \textit{Id.} at *25, *29.

\textsuperscript{11} \textit{Id.} at *13.

\textsuperscript{12} Sheet Metal Workers Local 15 (Brandon Regional Hospital), NLRB Advice Memorandum, at 3 n.4 (Apr. 4, 2003), http://www.nlrb.gov/nlrb/shared_files/admemo/admemo/12-cc-1258(04-04-03).pdf.

\textsuperscript{13} See, e.g., Discount Drug Mart, Inc., NLRB Advice Memorandum, at 1 (July 22, 2004), http://www.nlrb.gov/nlrb/shared_files/admemo/admemo/8-ca-34716(07-22-04).pdf (“[T]he Union’s placement of an inflated rat directly in front of the Employer’s store...was...picketing”). For an explanation of the NLRB General Counsel’s role, see infra note 14.

\textsuperscript{14} The NLRB General Counsel has responsibility for prosecuting unfair labor practice charges such as violations of section 8(b)(4)(ii)(B). \textit{NAT’L LABOR RELATIONS BD., BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT} 33 (1997). The General Counsel’s office is established by the NLRA:

There shall be a General Counsel of the Board who shall be appointed by the President... The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints...and in respect of the prosecution of such complaints before the Board. 29 U.S.C. § 153(d) (2000).

\textsuperscript{15} See, e.g., Laborers’ E. Region Organizing Fund (The Ranches at Mt. Sinai), 2005 NLRB LEXIS 273 (June 14, 2005); Richard A. Bock, Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 7 U. PA. J. LAB. & EMP. L. 905, 924 (2005).

This Note will argue that the General Counsel’s reasoning regarding union inflatable rats in secondary campaigns ignores the limits the First Amendment sets on Congress’s power to regulate union activity through legislation like the National Labor Relations Act (NLRA). The Supreme Court has established that while Congress has broad power to regulate conduct, its power to regulate speech only extends as far as the First Amendment’s narrow limits.17 As a result, the Court has held that section 8(b)(4)(ii)(B) of the NLRA,18 which regulates the tactics that unions can use to put pressure on secondaries,19 outlaws certain types of conduct completely but only places limited constraints on speech.20

For example, if the union in Brandon Regional Medical Center had decided to print the message from its handbills in a newspaper advertisement, it would arguably have been engaging in pure speech and so not subject to section 8(b)(4)(ii)(B)’s restrictions.21 If, however, it had sent several hundred union members to surround the medical center and block off its entrances, it would arguably have been engaging in conduct, rather than speech, to achieve its goal of pressuring the medical center to stop doing business with WTS.22 That conduct, in turn, would have violated section 8(b)(4)(ii)(B).

Picketing, according to the Supreme Court, is a combination of speech and conduct.23 For example, picketers will often engage in

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17 See, e.g., Texas v. Johnson, 491 U.S. 397, 407 (1989) (holding that government regulation that suppresses expression is subject to stricter scrutiny than regulation directed only at behavior).
   It shall be an unfair labor practice for a labor organization or its agents . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.
21 See, e.g., id. (section 8(b)(4)(ii)(B) does not ban appeals to the public via news media).
22 See, e.g., William J. Burns Int’l Detective Agency, 136 N.L.R.B. 431 (1962) (section 8(b)(4)(ii)(B) violation where union members marched in formation in front of entrance to secondary, causing consumers to have to push by them to get in).
23 DeBartolo II, 485 U.S. at 580.
speech by carrying signs that get across a written message, but will also engage in conduct, like marching in formation, that can be obstructive or intimidating.\textsuperscript{24} Section 8(b)(4)(ii)(B)’s restrictions should thus only apply to those aspects of picketing that use conduct, rather than speech, to achieve a union’s goals. The Court views handbilling as a form of pure speech, so union agents can handbill in contexts where they would not be able to picket.\textsuperscript{25} As a result, cases involving section 8(b)(4)(ii)(B) often revolve around labeling. Where a union can successfully label an inflatable rat as something similar to a handbill, it will not be found to have violated the law.\textsuperscript{26} Where the General Counsel can characterize an inflatable rat as a picket, the union may lose the right to use it in a secondary campaign.\textsuperscript{27}

This Note will argue that this focus on labeling results from a misreading of the Supreme Court’s rulings involving section 8(b)(4)(ii)(B). The issue is not whether a union’s conduct can be labeled as picketing or not. Rather, the Supreme Court’s First Amendment jurisprudence establishes that the true test of an inflatable rat’s legality in the context of a secondary boycott is whether a union convinces consumers to join in the boycott through persuasive speech or causes the consumers to avoid the secondary through conduct like blocking the entrance to a store. Under this test, certain forms of picketing can still be lawful, as long as the picketers achieve their ends through expression rather than conduct.

Part I of this Note will explore the background of this issue, explaining why unions use inflatable rats in secondary campaigns, the relevant background of Supreme Court jurisprudence regarding picketing and the First Amendment, and the Supreme Court’s interpretations of section 8(b)(4)(ii)(B), along with an analysis of the NLRB’s misapplication of the Supreme Court’s reasoning. Part I will

\textsuperscript{24} See, e.g., Tree Fruits, 377 U.S. at 77 (Black, J., concurring).
\textsuperscript{25} See DeBartolo II, 485 U.S. at 587-88. As mentioned earlier, supra note 9, DeBartolo II only protects “peaceful” handbilling. Id. at 584. Where, however, handbillers behave in a way that looks more like picketing, they may be subject to the picketing ban. See, e.g., Newark Morning Ledger Co., 1993 NLRB LEXIS 892, at *17 (Sept. 13, 1993) (“other coercive or intimidating conduct accompanying the handbilling, such as patrolling, mass picketing, or blocking of ingress and ingress [sic], can transform the handbilling into picketing which can be proscribed by the N.L.R.A.”). Also, though the Supreme Court classifies activities like handbilling as protected speech, this does not mean that the NLRB cannot regulate handbilling at all. Publicity campaigns involving speech must still meet certain statutory restrictions. First, the campaigns must be truthful. Second, they cannot violate the prohibitions of section 8(b)(4)(ii)(B), which regulate union conduct with respect to other union members or employees. In essence, unions are forbidden from using rats, or any other kind of publicity medium, to induce or encourage a secondary’s own employees to go on strike or to picket. 29 U.S.C. § 158(b)(4) (2000); see also Bock, supra note 15.
\textsuperscript{26} See, e.g., DeBartolo II, 485 U.S. 568; Bock, supra note 15, at 920-25.
\textsuperscript{27} See, e.g., NLRB v. Retail Store Employees Union, Local 1001 (Safeco), 447 U.S. 607 (1980).
also present an argument for why, given the Supreme Court’s First Amendment jurisprudence, inflatable rats should not be prohibited as pickets. Since the use of inflatable rats is a relatively untested area of labor law, Part II of this Note will consider the NLRB’s approach to unions that use large banners in secondary campaigns. The General Counsel has tried, largely unsuccessfully, to argue that such banners, like inflatable rats, are unlawful pickets. This Note will argue that the reasoning a number of ALJs and federal courts have applied to such banners, that is, that they are forms of protected speech rather than conduct, applies by analogy to the use of inflatable rats. Finally, Part III will explain how section 8(c) of the NLRA compels the NLRB to apply the Supreme Court’s First Amendment rulings to the use of inflatable rats.

I. UNION SECONDARY CAMPAIGNS AND THE DEVELOPMENT OF LAWS REGULATING THEM

A. Why Unions Use Inflatable Rats

Unions have been using inflatable rats for almost twenty years and have found them to be effective tools for publicizing disputes with employers. Such publicity can help to put pressure on employers during contract negotiations or campaigns to organize new members. Many unions see organizing campaigns as the key to regaining the economic strength that they have lost over the past few decades. Employers can have a great deal of influence over whether or not their employees join unions, so the effectiveness of union pressure on an employer can determine the outcome of an organizing campaign.


29 See Frankel, supra note 28.

30 Over the past few decades, the percentage of workers represented by unions has dropped. In the 1950s, around thirty percent of all employees in the United States were in unions. In 2005, only thirteen percent were union members. This decline reduces the power and influence, both economic and political, of unions. To regain this lost power, unions have been trying to find new ways to organize, that is, to recruit workers to join unions. The recent split in the AFL-CIO, an umbrella organization for many of the unions in the United States, involved dissident unions whose leaders felt that the organization was not spending enough money on efforts to organize. See Stephen Greenhouse, Splintered, but Unbowed, N.Y. TIMES, July 30, 2005, at C1; Gary Fields, Timothy Aeppl, Kris Maher & Janet Adamy, Reinventing the Union, WALL ST. J., July 27, 2005, at B1.

31 The process through which the NLRA regulates organizing campaigns provides employers the means with which to resist them. If a majority of the employees at a company decide to join a union, they can do so without much formality, as long as the employer does not object.
Where an employer tries to keep its employees from joining a union, the union can picket the employer in order to apply economic pressure and break down the employer’s resistance. If the employer continues to resist, the union might then focus on a secondary like Brandon Regional Medical Center. The goal of such a campaign would be to get the secondary to stop doing business with the non-union primary.

In union actions against a secondary, the NLRA forbids certain forms of conduct, including strikes and, to a great extent, picketing. However, where a union’s actions consist of pure speech, rather than conduct, the NLRA’s restrictions give way to the First Amendment. Thus, a union can peacefully publicize the fact that the secondary is using a non-union contractor or selling products made by a non-union company. Such a campaign might encourage the secondary to stop...
doing business with the primary in order to avoid the bad publicity or to regain customers lost because of the campaign.\footnote{See, e.g., Alorie Gilbert, Labor Activists Picket Outsourcing Event, CNET NEWS.COM, Sept. 18, 2003, http://news.com.com/Labor+activists+picket+outsourcing+event/2100-1022_3-5077627.html (union protest against jobs being sent offshore).} While such a campaign might achieve the same ends as striking or picketing, as long as it is conducted through pure speech like handbilling or newspaper advertising it is subject to fewer restrictions than striking or picketing because of the First Amendment’s protections.\footnote{See, e.g., Sw. Reg’l Council of Carpenters, 2004 NLRB LEXIS 660, at *44 (Nov. 12, 2004) (employer testimony regarding pressure from customers and landlord because of union secondary publicity campaign).} Large inflatable rats are especially effective tools for such publicity campaigns, since they attract a good deal of attention.\footnote{See, e.g., Laborers’ E. Region Organizing Fund, 2005 NLRB LEXIS 273, at *28 (June 14, 2005). The president of the primary employer in that case testified that before unions began using rats, they would need to bring dozens of people out to demonstrations to get attention; using rats allowed unions to get the same amount of attention with fewer people than before.} The problem for unions is that if the NLRB continues to characterize the use of inflatable rats as a form of picketing, rather than as a form of speech for the purpose of publicity, unions may be denied the use of these effective tools.\footnote{See, e.g., Fullerton III, supra note 28.}

1. The Definition of Picketing

In order to understand how the Supreme Court construes the First Amendment with respect to picketing, it is helpful to understand how the Court’s concept of picketing has derived from the term’s origins. Picketing is an ill-defined concept, and this is one of the reasons that inflatable rats can be characterized as pickets even when they do not walk around with picket signs or chant slogans.\footnote{The Court’s comment in \textit{Thornhill v. Alabama}, 310 U.S. 88, 100-01 (1940), that in the state statute at issue, the “vague contours of the term ‘picket’ are nowhere delineated,” applies as well to the section 8(b)(4)(ii)(B). The Court also cited a listing in a law review article of many of the different ways that statutes had defined picketing: A picker may: (1) Merely observe workers or customers. (2) Communicate information, e.g., that a strike is in progress, making either true, untrue or libelous statements. (3) Persuade employees or customers not to engage in relations with the employer: (a) through the use of banners, without speaking, carrying true, untrue or libelous legends; (b) by speaking, (i) in a calm, dispassionate manner, (ii) in a heated, hostile manner, (iii) using abusive epithets and profanity, (iv) yelling loudly, (v) by persisting in making arguments when employees or customers refuse to listen; (c) by said to be undermining the living standards of others in the area by paying their workers substandard wages or by patronizing those who do. Such campaigns are sometimes directed at issues other than organizing workers. See, e.g., Brian K. Beard, Comment, Secondary Boycotts after DeBartolo: Has the Supreme Court Handed Unions a Powerful New Weapon?, 75 IOWA L. REV. 217 (1989) (arguing that in allowing expressive activity that can bring about an effective secondary boycott, the Supreme Court has ignored the legislative intent behind section 8(b)(4)(ii)(B)).} The malleability of
the term “picket” derives in part from its history. “Picket” was originally a military term, referring to armed sentries posted to watch for enemy troops.\textsuperscript{43} It came into use in the labor context just after the civil war, at a time when labor disputes were often fraught with the threat of violence.\textsuperscript{44} State courts in the nineteenth and early twentieth centuries often viewed picketing as inherently violent and coercive.\textsuperscript{45} In attempting to establish that the Sheet Metal Workers had been picketing, the ALJ in \textit{Brandon Regional Medical Center} wrote that union members need not patrol in order to picket; picketing could consist merely of the posting of individuals at the approach to a place of business.\textsuperscript{46} This definition of picketing hearkens back to its military meaning.\textsuperscript{47} It might make sense to say that a person posted at the

offering money or similar inducements to strike breakers. (4) Threaten employees or customers: (a) by the mere presence of the picketer; the presence may be a threat of, (i) physical violence, (ii) social ostracism, being branded in the community as a “scab,” (iii) a trade or employees’ boycott, i.e., preventing workers from securing employment and refusing to trade with customers, (iv) threatening injury to property; (b) by verbal threats. (5) Assaults and use of violence. (6) Destruction of property. (7) Blocking of entrances and interference with traffic.

The picketer may engage in a combination of any of the types of conduct enumerated above. The picketing may be carried on singly or in groups; it may be directed to employees alone or to customers alone or to both. It may involve persons who have contracts with the employer or those who have not or both. \textit{Id.} at 101 n.18 (quoting Jerome R. Hellerstein, \textit{Picketing Legislation and the Courts}, 10 N.C. L. REV. 158, 186 (1931)).

\textsuperscript{43} The term “picket” comes from a French word for a “pointed stake . . . for defense against cavalry.” In the eighteenth century, it came to mean “troops posted to watch for enemy.” Online Etymology Dictionary, http://www.etymonline.com/index.php?term=picket (last visited Nov. 14, 2006). The term was commonly used during the civil war. \textit{Id.}

\textsuperscript{44} Two years after the end of the civil war, the term was first used to refer to “striking workers stationed to prevent others from entering a factory.” \textit{Id.} The nationwide railroad strike of 1877 and the responses to it by soldiers were so violent that business leaders in New York donated money for the construction of the Seventh Regiment Armory; its tower could be mounted with gatling guns, a precursor to the machine gun, which could be used to sweep Fourth (later Park) Avenue. \textit{Edwin G. Burrows & Mike Wallace, Gotham: A History of New York City to 1898,} at 1035-37 (1999). This occurred even though the violence did not actually reach New York. \textit{Id.}

\textsuperscript{45} See, e.g., Mark D. Schneider, Note, \textit{Peaceful Labor Picketing and the First Amendment,} 82 COLUM. L. REV. 1469, 1490 (1982) (collecting cases that refer to picketing as “a formation of actual warfare” and “in and of itself . . . coercive”). Justice Oliver Wendell Holmes was in the minority when he wrote in 1896, “it cannot be said, I think, that two men, walking together up and down a sidewalk . . . do necessarily and always thereby convey a threat of force.” \textit{Vegelahn v. Gunter,} 44 N.E. 1077, 1080 (Mass. 1896) (Holmes, J., dissenting). The case involved a pair of workmen who were picketing their employer during a strike. The court enjoined the picketing on the theory that this was an unlawful interference with the employer’s rights “by means of threats and intimidation.” \textit{Id.} at 1078. Holmes noted that the injunction would forbid picketing even if it did not involve threats of violence. \textit{Id.} at 1081. Congress enacted the NLRA in 1935 in an effort to eliminate obstructions to the free flow of commerce by, among other things, “removing certain recognized sources of industrial strife and unrest.” 29 U.S.C. § 151.


\textsuperscript{47} See supra note 43.
entrance of a building engages in threatening conduct if he is holding a rifle in his hands.48 However, handbillers also stand near the approach to a place of business. By the logic of the ALJ in Brandon Regional Medical Center, one could define handbillers as picketers as well. Yet, the Supreme Court has made it clear that section 8(b)(4)(ii)(B) does not prohibit handbilling.49 Thus, it is possible to post people at the entrance of a building for the purpose of speech—that is, giving out handbills—as well as conduct. Labeling a particular activity as picketing does not necessarily clarify whether or not it violates section 8(b)(4)(ii)(B).50

Moreover, the posting of people is not the only definition of picketing. Despite its military origins, the term “picket” also has come to denote a person who carries a sign or wears a placard to convey information.51 In 1941, not long after the NLRA was enacted to quell the industrial strife that picketing embodied in its military meaning, the Supreme Court called picketing “the workingman’s means of communication.”52 By the time Congress amended the NLRA in 1959 in order to limit picketing of secondary employers, it was necessary to include the words “threaten, coerce, or restrain” in section 8(b)(4)(ii)(B) in order to describe the particular type of behavior that Congress meant to limit, thus suggesting that peaceful picketing was possible.53 In Tree Fruits, a case that will be discussed in more detail later, the Supreme Court read this language to imply that Congress did not mean to ban all secondary picketing, and that picketing is not, of necessity, a coercive act.54 Thus, there is an inherent tension in the term “picketing.” Its military origins suggest that it is a form of conduct that is always coercive, while later definitions suggest that it is expressive activity.

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48 Another definition of picketing that the Brandon Regional Medical Center ALJ cited gets across this meaning: “Picketing has been defined as conduct ‘which may induce action of one kind or another irrespective of the nature of the ideas which are being disseminated.’” Brandon Reg’l Med. Ctr., 2004 NLRB LEXIS 688, at *27 (citing Serv. Employees Local 254 (Womens & Infants Hospital), 324 N.L.R.B. 715, 743 (1997)).


50 Id.


54 NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits), 377 U.S. 58, 71 (1964). The Court also noted that:

When Congress meant to bar picketing per se, it made its meaning clear; for example, § 8 (b)(7) makes it an unfair labor practice, “‘to picket or cause to be picketed . . . any employer . . . .’” In contrast, the prohibition of § 8 (b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise.

Id. at 68.
B. **Speech, Conduct, and Picketing in First Amendment Jurisprudence**

Picketing’s dual nature as a form of coercive conduct and of peaceful expression informs the way the Supreme Court has decided cases involving picketing. The Court approaches picketing as part of its First Amendment jurisprudence.\(^{55}\) Under the First Amendment’s Free Speech Clause, the Court has constructed specific approaches to government regulation of activities that, like picketing, achieve effects both through speech and conduct. The Court has established that the First Amendment allows government broader power to regulate the conduct that accompanies speech than the content of the speech.\(^{56}\) Where speech and conduct are inextricably linked, as in picketing, government retains its broad power to regulate the concomitant conduct.\(^{57}\) However, such regulations must be directed at the conduct itself, not at the particular message of the speech that goes with it.\(^{58}\) Thus, for example, where a man was prosecuted for burning an American flag, the Court held that while a government might have broad power to regulate the act of burning, it would have to meet far stricter standards, based on First Amendment jurisprudence, in order to restrict the kind of message a person might try to express by burning the flag.\(^{59}\) When it attempts to regulate speech itself, whether pure speech or the speech component of an activity that mixes speech and conduct, government can only forbid speech in a narrow set of categories, for example, speech that is likely to incite imminent lawless action;\(^{60}\) “fighting words” that might provoke others to riot;\(^{61}\) or “true threats”

\(^{55}\) The First Amendment states, in pertinent part, “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.


\(^{57}\) See, e.g., United States v. O’Brien, 391 U.S. 367, 376 (1968) (“[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”).

\(^{58}\) Id.

\(^{59}\) Johnson, 491 U.S. at 407 (holding that the relatively lenient standard in O’Brien allowing conduct regulations that incidentally burden speech does not apply to regulations aimed at suppressing free expression).

\(^{60}\) See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding unconstitutional a state statute applied against a Ku Klux Klan speech that advocated criminal activity); Bridges v. California, 314 U.S. 252 (1941) (noting that measures abridging speech must protect against a substantial and imminent threat).

\(^{61}\) See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) (holding that regulation of speech “likely to provoke the average person to retaliation, and thereby cause a breach of the
that provoke fear of violence in the listener.62

In *Thornhill v. Alabama*, the Court held that a labor union’s peaceful picketing was expressive activity that deserved full First Amendment coverage.63 The case involved a dozen men who walked peacefully with picket signs.64 The Court noted that a mass picket, which could be a threat to public order, would be more amenable to regulation than a small, peaceful demonstration.65 Thus, government would have a free hand in regulating the conduct element of the picketing, embodied in the size of the crowd involved, but not the picketers’ message. The picketers’ message could only be subject to the limited class of restrictions that the First Amendment allows. For example, in *Giboney v. Empire Ice*, the Court held that a local government could regulate peaceful picketing where the picketers’ message provoked others to violate the law.66

In *Thornhill*, the Court was able to distinguish between picketing that is mainly expressive, as embodied in the small group of peaceful picketers in the case, and the kind of mass picketing that raises the specter of picketing’s older, military meaning. In subsequent cases, however, the Court began to drift away from the reasoning in *Thornhill*. For example, in *Bakery Drivers v. Wohl*, the Court again ruled in favor of a group of peaceful labor picketers,67 but rather than declare the state anti-picketing law under which they had been charged unconstitutional, the Court focused on the law’s application.68 Under *Thornhill*, the state anti-picketing law would have been considered unconstitutional because it was overbroad, that is, because it outlawed even picketing that the First Amendment protects, without meeting the First Amendment’s standards for such regulation.69 Because of this, Justice Douglas, in a concurring opinion, noted that the *Wohl* decision did not rest on the same principles as *Thornhill*.70 He warned that the court seemed to be

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64 *Id.* at 94.
65 *Id.* at 105.
66 *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (affirming an injunction against picketers who urged an unlawful act); see also *Hughes v. Superior Court of Cal.*, 339 U.S. 460 (1950) (holding that a state could permissibly regulate picketing because of its conduct elements and could even regulate the expressive element of peaceful picketing that urged illegal action).
68 *Id.*
69 *Id.*
70 *Id.* at 775. Justice Douglas explained the *Thornhill* reasoning as follows:

Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since 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
moving away from the idea that government could only regulate the conduct element of picketing broadly.\textsuperscript{71}

In \textit{International Brotherhood of Teamsters v. Vogt}, the Court ruled that a state could enjoin peaceful picketers from putting pressure on an employer to have his employees join a union.\textsuperscript{72} Writing for the majority, Justice Frankfurter cited a series of cases that had limited the picketing-as-protected-speech principle of \textit{Thornhill}.\textsuperscript{73} Justice Douglas, in dissent, wrote that the Court had “come full circle” by allowing for blanket anti-picketing laws without regard to whether such laws were tailored to the narrow limits the First Amendment allows.\textsuperscript{74}

Thus, by 1964, when the Court first addressed the anti-boycott and anti-picketing provisions of section 8(b)(4)(ii)(B) in \textit{Tree Fruits},\textsuperscript{75} it had greatly revised its approach to First Amendment protections of picketing. In order to understand the Court’s ruling in that case, it will be helpful first to review the origins of section 8(b)(4)(ii)(B).

\section*{C. The Origins of Section 8(b)(4)(ii)(B) and the Regulation of Secondary Picketing}

The cases mentioned in \textit{Vogt} related to state efforts to regulate secondary boycotts and picketing.\textsuperscript{76} During that same period, Congress also addressed these issues. Congress passed the sections of the NLRA that regulate secondary boycotts, including section 8(b)(4)(ii)(B), in the wake of a wave of union growth in the 1940s that followed the enactment of the first sections of the statute in 1935.\textsuperscript{77} During the late 1940s, unions used secondary boycotts to particularly devastating effect. For example, in \textit{Giboney}, members of a peddler’s union disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.

\textit{Id.} at 776.

\textsuperscript{71} “[T]he statute is not a regulation of picketing \textit{per se}—narrowly drawn, of general application, and regulating the use of the streets by all picketeers. In substance it merely sets apart a particular enterprise and frees it from all picketing. If the principles of the \textit{Thornhill} case are to survive, I do not see how New York can be allowed to draw that line.”

\textit{Id.} at 777.


\textsuperscript{73} \textit{Id.} at 287-93.

\textsuperscript{74} \textit{Id.} at 295 (“[W]here, as here, there is no rioting, no mass picketing, no violence, no disorder, no fisticuffs, no coercion - indeed nothing but speech - the principles announced in \textit{Thornhill}...should give the advocacy of one side of a dispute First Amendment protection.”).

\textsuperscript{75} NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (\textit{Tree Fruits}), 377 U.S. 58 (1964).

\textsuperscript{76} Vogt, 354 U.S. at 287-293.

\textsuperscript{77} COX ET AL., \textit{supra} note 8, at 89.
picketed a distributor that supplied ice to non-union peddlers. Truck drivers in other unions refused to cross the picket line; the distributor, a secondary, lost eighty-five percent of its business. In response to public fears of union action and complaints by employers and critics of unions, Congress amended the NLRA in 1947 and 1959. Although the term “secondary boycott” never appeared in either amendment, the legislative history makes it clear that the original 1947 amendment was specifically intended to address union activity with respect to secondary employers. The 1959 amendments were aimed at closing certain loopholes that had become apparent in the earlier amendments. For the 1959 amendments, members of the Senate insisted on adding a new section that would prevent the amendments from restricting the ability of unions to make appeals to the general public. This new section became known as the publicity proviso. Together, the amendments created section 8(b)(4)(ii)(B) as it exists today.

Section 8(b)(4)(ii)(B) actually does not outlaw secondary boycotts. Rather, it regulates the means by which unions can enforce such boycotts. Suppose, for example, a union of produce workers had a dispute with wholesale companies that sell apples to supermarkets. The union might take out an advertisement in a newspaper asking consumers not to patronize supermarkets that sell the wholesaler’s apples. Though aimed at a secondary, this kind of boycott campaign would not violate the NLRA. This is because of the publicity proviso. As long as the information they present is truthful and they

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78 336 U.S. at 492.
79 Id., see also COX ET AL., supra note 8, at 89 (describing how members of the United Brotherhood of Carpenters who worked at construction sites would refuse to use materials produced by firms with whom the union had disputes).
80 COX ET AL., supra note 8, at 89-92.
81 See, e.g., NLRB v. Denver Bldg & Constr. Trades Council, 341 U.S. 675, 686 (1951) (noting that Senator Taft, a sponsor of the amendment, was quoted in the legislative history as indicating that the point of the amendment was to make the secondary boycott an unfair labor practice).
83 Id. at 69-70 (quoting Senator Kennedy’s stated fears that the House bill would limit the ability of unions to make appeals via newspaper or radio, and his later statement that the proviso preserved the right of unions to appeal to consumers).
84 Id.
85 See GORMAN & FINKIN, supra note 18, at 109 (showing which parts of the statute were added with each amendment); Bock, supra note 15, at 908-16 (explaining the background and effect of the amendments and the Supreme Court decisions that interpret them).
86 This hypothetical is based on Tree Fruits, 377 U.S. at 58, the case which established the Supreme Court’s approach to section 8(b)(4)(ii)(B). The case is discussed further in Part I.D infra.
88 The publicity proviso provides that:
do not promote behavior that is otherwise unlawful, union publicity campaigns using media such as newspaper advertisements can lawfully promote secondary boycotts under section 8(b)(4)(ii)(B). As the next section of this Note will explain, the Supreme Court has interpreted the publicity proviso as preserving the right of unions to engage in truthful speech through such activities as handbilling directed at a secondary business.

If, however, the union were to send a large group of picketers to patrol the entrances to the supermarkets, in the hope that consumers would simply stay away from the store rather than risk crossing a gauntlet of angry, screaming picketers, the supermarkets would have a strong case for a charge against the union for violating section 8(b)(4)(ii)(B). The supermarkets could argue that the picketers’ conduct, rather than protected speech, was what convinced customers to stay away, since the customers were reacting to the fact that the

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[F]or the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

29 U.S.C. § 158(b)(4)(D) (2000). The statute forbids threats, coercion, and restraints against “any person engaged in commerce or an industry affecting commerce.” 29 U.S.C. § 158(b)(4)(i). This applies to businesses that are “engaged in commerce” according to the definition of the NLRA. However, with respect to employees of such businesses, section 8(b)(4)(i) also requires unions not to “engage in, induce, or encourage... a strike.” Id. A “strike” would include a simple refusal to deliver goods. Nat’l Labor Relations Bd., Basic Guide to the National Labor Relations Act 29 (1997). Thus, where employees are concerned, unions are forbidden even from inducing or encouraging a work stoppage directed at a secondary. Id. If the advertisement in the hypothetical encouraged such activity, the union would be liable. Id. For an explanation of the term “secondary employee,” see supra note 8. The Supreme Court interprets the term “products ‘produced by an employer’ broadly, so that it applies to subcontractors like WTS in Brandon Regional Medical Center. NLRB v. Servette Inc., 377 U.S. 46, 55-56 (1964).

Where an activity is lawful under the NLRA, all this means is that it will not constitute an unfair labor practice and so the NLRB will not be able to impose penalties. Where an activity that the NLRA permits still violates local laws that are not preempted by federal provisions, those activities will still be subject to sanction. Thus, for example, if a group of union handbillers violate local ordinances that place constitutionally valid time, place, and manner restrictions on such activity, they will be subject to local sanctions even if they do not violate the NLRA. See Kovacs v. Cooper, 336 U.S. 77 (1949) (approving the application of a local ordinance limiting loud noises to a sound truck publicizing a labor dispute). In addition, the publicity proviso does not allow publicity campaigns that induce or encourage the employees of a secondary to strike or picket—such behavior would violate section 8(b)(4)(ii)(B) of the NLRA. 29 U.S.C. § 158(b)(4). See the discussion of “signal picketing” in Part II.A infra.

See infra Part I.D.

See, e.g., Honolulu Typographical Union No. 37 v. NLRB, 401 F.2d 952, 953 (D.C. Cir. 1968) (union violated section 8(b)(4)(ii)(B) when it sent thirty to sixty picketers who marched “shoulder to shoulder” across the front entrance of a shopping center).
picketers blocked them from entering the secondary rather than being persuaded by the message the picketers conveyed.\textsuperscript{92} The supermarkets could then argue that the union’s conduct served to “threaten, coerce, or restrain” them by attempting to put them out of business if they continued to sell the primary’s apples.\textsuperscript{93} Thus, the NLRA does not outlaw all secondary boycotts, just the use of particular union tactics that achieve secondary boycotts through conduct rather than persuasive speech.\textsuperscript{94}

The publicity proviso covers methods of communication “other than picketing.”\textsuperscript{95} This means that picketing is subject to the prohibitions of section 8(b)(4)(ii)(B). This is consistent with the First Amendment, given the distinction between protected pure speech in the Supreme Court’s First Amendment doctrine and activities like picketing, which mix speech and conduct. Where 300 union members stand shoulder-to-shoulder to block the entrance to a business, it is likely that they are using conduct to effect a boycott. Even if they happen to be speaking at the same time, the conduct is enough to subject them to regulation, regardless of any incidental effect the regulation might have on their speech. Where, however, the picketing only involves several union members who pace near the entrance to the secondary business carrying signs, it is less clear that it is the members’ conduct, rather than their speech, that achieves their goals.

D. Supreme Court Rulings on Section 8(b)(4)(ii)(B): Tree Fruits, Safeco, and DeBartolo II

In *Tree Fruits*, the Supreme Court addressed the kind of peaceful

\textsuperscript{92} Picketing is not the only form of conduct that can violate section 8(b)(4)(ii)(B). See, e.g., Pye v. Teamsters Local 122, 61 F.3d 1013, 1016 (1st Cir. 1995) (granting temporary injunction against union “shop-in” in which members disrupted the business of a secondary store by repeatedly buying small items with large denomination bills).


\textsuperscript{94} Such coercive tactics do not violate the NLRA when they are directed at primary employers like the wholesaler in the hypothetical. This is not to say that unions would be able to use tactics that violate local laws against public disturbances. If the picketers were to become violent, they would be subject to arrest. See supra note 89. The NLRA’s provision that allows picketing (referred to under the rubric of “concerted activities” in 29 U.S.C. § 157) does not give unions a free pass to engage in public disturbances, but rather protects them against common-law and statutory legal restraints that used to prohibit even peaceful union activity. For example, before the passage of the NLRA and certain other federal statutes, unions that engaged in primary picketing or secondary boycotts could be subject to antitrust laws, or could be prosecuted for criminal conspiracy. See Bock, supra note 15, at 908-17.

\textsuperscript{95} The word “picketing” does not appear in the part of the section that proscribes coercive, threatening, or restraining actions. Rather, it appears later, in the “publicity proviso” that modifies all of section 8(b)(4). 29 U.S.C. § 158(b)(4).
picket described in the preceding section. The Teamsters union was engaged in a labor dispute with the Tree Fruits Labor Relations Committee, which represented apple-packing companies in Washington State. In order to put pressure on the Committee, the union sent picketers to Safeway supermarkets that sold apples packed by the Committee’s member companies. The picketers patrolled in front of the entrances to the stores and carried signs that asked the stores’ customers not to buy the apples. The supermarkets, like Brandon Medical Center, filed charges with the NLRB, which charged that the union members had engaged in unlawful secondary picketing. The NLRB held that picketing aimed at encouraging a consumer boycott is unlawful because “such picketing ‘threatens, coerces, or restrains.’”

The Supreme Court reversed the NLRB’s holding in *Tree Fruits*. The Court held that even though the publicity proviso to section 8(b)(4)(ii)(B) might seem, on its face, to forbid any picketing directed at a secondary such as the supermarket, the picketing in this instance did not violate the statute. The union appealed to the supermarkets’ customers to boycott only the primary employer’s apples. Since the store carried many products other than those particular apples, the campaign was not coercive because it was not intended to put the supermarkets out of business.

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97 Fruit & Vegetable Packers & Warehousemen, Local 760 (*Tree Fruits*), 132 N.L.R.B. 1172, 1174 (1961). This was the campaign described in the hypothetical campaign mentioned in section I.C supra.

98 Id. In this case, the companies that formed the committee were the primary employers, while the Safeway Supermarkets were the secondaries. Secondary campaigns are not necessarily used for organizing drives alone. In this particular case, the union was not attempting to organize the Committee members’ employees; the employees had already joined Local 760. The employees were engaged in a strike against the Committee during contract negotiations. Id.

99 Id. at 1175.

100 Id. at 1177. This case was decided directly by the NLRB, rather than an ALJ.

101 Id.


103 Id. at 71. The reason the statute could be read to prohibit all consumer picketing is that the publicity proviso excepts “publicity, other than picketing . . . .” Id. at 59. While it was reasonable to interpret this language as outlawing picketing directed at consumers, the Court held that this interpretation could bring the statute into conflict with the First Amendment. Id. at 63. This is because the Court recognized that, as cases like *Thornhill* had established, peaceful picketing combines speech and conduct, and a total ban on picketing could suppress protected speech. Id. In order to avoid such a problem, the court interpreted the statute as reaching only picketing that coerced the secondary to stop doing business with the primary. Id. Since the campaign in this instance was aimed at just one product of many that the secondary carried, rather than the secondary’s entire business, the court held that the campaign was not coercive. Id. at 72.

104 Id. at 60.

105 Id. at 72. Any coercion felt by the primary, the apple supplier, in losing business from the store, would not violate section 8(b)(4). Unions can use coercive tactics, including strikes and picketing, against primaries. See Nat’l Labor Relations Bd., Basic Guide to the
In writing this opinion, Justice Brennan was attempting to comply with the Court’s doctrine of not construing acts of Congress in a way that would bring them into conflict with the Constitution. Thus, the opinion merely held that Congress did not intend to prohibit the type of peaceful picketing involved in the case. Justice Black, however, in a concurring opinion, wrote that the statute did, indeed, prohibit peaceful picketing, and that it should be struck down as unconstitutional based on the \textit{Thornhill} doctrine of affording First Amendment protection to peaceful picketing.

The majority’s logic in \textit{Tree Fruits} led to its \textit{Safeco} decision. The Court held that where a similar boycott campaign threatened the secondary’s entire business, the picketing was coercive, and so prohibited. Archibald Cox, in criticizing the opinion, observed that the Court was approving, in a four-vote plurality supported by a single concurrence, what amounted to a restriction on pure speech. He noted that Justice Stevens’ concurrence, which supplied the fifth vote, invoked the \textit{Thornhill} principle that Justice Douglas had mentioned in \textit{Bakery Drivers v. Wohl}, stating that conduct like patrolling is often the most effective aspect of picketing; patrolling calls for an “automatic response to a signal” rather than to a persuasive message. In other words, while picketers might persuade through speech, they will also influence others through their conduct. Cox noted that Justice Stevens

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\textit{NATIONAL LABOR RELATIONS ACT 10-11 (1997).}

106 \textit{Id.} at 63.

107 Justice Black wrote: “Picketing,” in common parlance and in § 8(b)(4)(ii)(B), includes at least two concepts: (1) patrolling, that is, standing or marching back and forth or round and round on the street, sidewalks, private property, or elsewhere, generally adjacent to someone else’s premises; (2) speech, that is, arguments, usually on a placard, made to persuade other people to take the picketers’ side of a controversy…. While “the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution,” patrolling is, of course, conduct, not speech, and therefore is not directly protected by the First Amendment…. When conduct not constitutionally protected, like patrolling, is intertwined, as in picketing, with constitutionally protected free speech and press, regulation of the non-protected conduct may at the same time encroach on freedom of speech and press. In such cases it is established that it is the duty of courts, before upholding regulations of patrolling, “to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights” of speech and press.

\textit{Tree Fruits}, 377 U.S. at 77 (citing \textit{Thornhill} v. Alabama, 310 U.S. 88, 102 (1940) (other citations omitted)). Though Justice Douglas, who had been warning the Court about its abandonment of the \textit{Thornhill} doctrine, was on the Court at the time, he did not take part in the consideration of the case or in the decision. \textit{Id.} at 58.


109 \textit{Id.} at 611-614.

110 Archibald Cox, \textit{Freedom of Expression in the Burger Court}, 94 HARV. L. REV. 1, 36-37 (1980) (stating that the union’s “objectives were ‘unlawful’ only in a Pickwickian sense”)

did not specify what sort of conduct would be likely to bring about such an automatic response; after all, the picketers had acted peacefully.\textsuperscript{112} Recalling his role as Solicitor General in presenting the Government’s case in \textit{Tree Fruits}, Cox wrote that a lawyer for the union in that case had pointed to a picture of the frail, elderly, white-haired men and women who were picketing and asked how it was that their conduct would have influenced anyone apart from the ideas they expressed.\textsuperscript{113}

\textit{Safeco} left open the question of whether a boycott achieved through pure speech, rather than a mixture of speech and conduct like picketing, would be covered by the publicity proviso if it could potentially, like the picketers in \textit{Safeco}, put a secondary out of business. The Court resolved this issue in \textit{DeBartolo II},\textsuperscript{114} holding that where a union attempts, through speech alone, to persuade customers not to patronize a secondary, the union does not violate section 8(b)(4)(ii)(B) even if the speech has a coercive effect on the secondary.\textsuperscript{115} The speech in question appeared on handbills that urged consumers not to patronize a shopping mall where a nonunion contractor was working.\textsuperscript{116} This campaign clearly was directed at secondaries; the union was asking consumers not to patronize the entire mall, even though only one store within the mall had hired the nonunion contractor.\textsuperscript{117} However, the Court ruled that because of the publicity proviso, section 8(b)(4)(ii)(B) simply did not reach the kind of publicity campaign the union engaged in, even if the union were to urge a total boycott of the secondaries that could potentially put them out of business.\textsuperscript{118} As long as such a campaign consisted only of truthful speech protected by the First Amendment, it would not violate section 8(b)(4)(ii)(B).\textsuperscript{119}
The DeBartolo II opinion finds support for this reasoning in the legislative history of section 8(b)(4)(ii)(B). Senator Kennedy had asserted that the provision that became the publicity proviso would allow union members to engage in expression through handbills and newspaper and radio advertisements and any other form of publicity apart from “ambulatory picketing” in front of a secondary. The word “ambulatory” suggests how forms of pure speech like handbills and newspaper advertisements differ from picketing, in which union members will often patrol back and forth in front of the entrance to an employer’s place of work. “Ambulatory” picketing combines the conduct of patrolling with the speech element of the union’s publicity message, so a statute like the NLRA can set more restrictions on picketing than it could on pure speech.

E. The DeBartolo II / Thornhill Rule: A New (Old) Definition of Picketing

NLRB officials usually see DeBartolo II as standing for the proposition that handbilling receives complete First Amendment protection through the operation of the publicity proviso, leaving picketing subject to the section 8(b)(4)(ii)(B) constraints on coercion.
However, a close look at the decision reveals another aspect, one that is at the core of this Note’s argument regarding inflatable rats. *DeBartolo II* not only addresses the distinction between picketing and handbilling, but also delineates the extent to which the First Amendment allows Congress and the NLRB to regulate picketing. Laws directed at picketing or any other form of conduct that has an expressive element can set extensive limits on conduct but can only restrict the expression of ideas within the First Amendment’s constraints. It is not enough to determine whether or not a union has engaged in picketing in order to determine whether or not section 8(b)(4)(ii)(B)’s restrictions apply; rather, the inquiry must address whether or not a union is using conduct, rather than speech, to effect a secondary boycott.

This argument derives from two aspects of the *DeBartolo II* opinion. First, the *DeBartolo II* opinion adopts the reasoning in Justice Stevens’ *Safeco* concurrence. That concurrence revived the reasoning of *Thornhill*, that is, that picketing can be regulated only to the extent that the picketers achieve their ends through conduct rather than expression. By citing Stevens’ concurrence, the *DeBartolo II* court limits the *Safeco* opinion. Rather than accept the four-justice plurality’s reasoning regarding the message of the pickets, which so troubled commentators like Cox, the *DeBartolo II* opinion reinstates the *Thornhill* approach to regulations of picketing.

In addition to citing to the Stevens concurrence rather than the plurality from *Safeco*, the *DeBartolo II* opinion establishes its rule regarding picketing through the following language:

> 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.

Thus, *DeBartolo II* does not only establish that persuasion via handbill is protected speech, but also that for Congress to regulate picketing outside the narrow confines of First Amendment doctrine, the picketing in question has to achieve its ends through conduct, for example, intimidation by a line of picketers who are blocking the

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123 *DeBartolo II*, 485 U.S. at 580.
124 *Thornhill* v. Alabama, 310 U.S. 88, 104 (1940) (“It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern.”).
125 *See Overstreet v. United Bhd. of Carpenters*, 409 F.3d 1199, 1210 (2005) (“Justice Stevens’ *Safeco* concurrence, rather than Justice Powell’s plurality opinion, provided the rationale for prohibiting secondary picketing consistent with the First Amendment that a majority of the Court eventually adopted.”).
126 *Id.* (emphasis added).
entrance to a store. Where, as in Tree Fruits, there are only several peaceful picketers who are doing nothing to intimidate but merely are trying to persuade, their actions receive First Amendment protection.

After years of whittling away at the Thornhill rule, the Court revived the rule in DeBartolo II. Thus, when NLRB officials consider charges filed against unions for violations of section 8(b)(4)(ii)(B), they should employ the DeBartolo II/Thornhill rule by inquiring as to whether or not, in Justice Stevens’ Safeco formulation, it is “the conduct element rather than the particular idea being expressed that . . . provides the most persuasive deterrent to third persons about to enter a business establishment.”127 As the next section will demonstrate, however, NLRB officials do not have a consistent approach to picketing. While some of the Board’s decisions have recognized the DeBartolo II/Thornhill rule, others rely on reasoning that violates First Amendment standards. The Board’s standards for what it considers prohibited picketing are vague, and this is what allows the General Counsel to argue that inflatable rats engage in picketing, or that their presence transforms protected handbilling into prohibited picketing.

F. The NLRB’s Approach to Secondary Picketing

As noted earlier, section 8(b)(4)(ii)(B) outlaws coercive conduct, not just picketing. When investigating a charge of a section 8(b)(4)(ii)(B) violation, NLRB officials could simply inquire into whether a charged union engaged in coercive conduct or speech. The Division of Advice128 has described the NLRB’s approach as looking to see whether, under the totality of the circumstances, the union is using conduct, rather than speech, to induce a sympathetic response.129 This is the approach that the Board used in William J. Burns International Detective Agency, which is consistent with the DeBartolo II/Thornhill

127 NLRB v. Retail Store Employees Union (Safeco), 447 U.S. 607, 619 (1980).
128 The NLRB Division of Advice is a division of the General Counsel’s staff. See NAT’L LABOR RELATIONS BD., supra note 6, §§ 202.1, 202.1.2. Where an unfair labor practice charge involves a novel area of law, the General Counsel may require that the charge be submitted to the Division of Advice for consideration before a complaint is issued. See NAT’L LABOR RELATIONS BD., NATIONAL LABOR RELATIONS BOARD: STATEMENTS OF PROCEDURE § 101.8, available at http://www.nlrb.gov/nlrb/legal/manuals/rules/part101.asp. The Division will then issue an Advice Memorandum that discusses the issues and gives instructions on whether or not the charge should move forward. See Questions and Answers, 81 LAW LIBR. J. 623, 629-30 (1989). While such memoranda do not have the same precedential value as NLRB Board decisions, courts will give them weight because of the Division of Advice’s presumed expertise in the issues it considers. See Christine Neylon O’Brien, The Impact of Employer E-Mail Policies on Employee Rights to Engage in Concerted Activities Protected by the National Labor Relations Act, 106 DICK. L. REV. 573, 584 n.70. (2002).
In that case, several dozen union members marched in front of the entrance to a trade show that had hired a non-union contractor. Apart from marching, the union members did not do anything normally associated with picketing: They did not carry signs or wear placards, they did not shout abuse at passersby or make loud noises, and they did not post members next to the entrance. They did, however, march in such a way that some customers had to push past them to get into the exhibit hall. In addition, some of the marchers gave out handbills. The ALJ noted that handbilling, by itself, would not constitute an unfair labor practice. However, he found that because the marchers had physically restrained the customers of the secondary business—in this case the trade show’s organizer—they were engaged in physical conduct that violated section 8(b)(4)(ii)(B).

This decision illustrates the basic principle that the Supreme Court established in cases like *Thornhill* and *DeBartolo II*. Statutes like section 8(b)(4)(ii)(B) can regulate conduct such as marching that blocks the secondary’s entrance. Such conduct need not be labeled as picketing; the ALJ pointed out that such labeling was beside the point. That the union members happened to be handbilling did not make this conduct legal under section 8(b)(4)(ii)(B). Where people engage in prohibited conduct, any incidental effect on speech does not inoculate the conduct from the law.

Unfortunately, the General Counsel and other NLRB officials do not always follow the rule of *William J. Burns International Detective Agency*, which is essentially the *DeBartolo II*/*Thornhill* rule. In cases like *Brandon Regional Medical Center*, they will simply attempt to label a union’s activity as picketing, rather than look at the type of conduct the union engages in. By focusing on indicia of picketing, rather than conduct, these NLRB officials set what is essentially a bright-line rule for section 8(b)(4)(ii)(B) violations: As long as an activity can be labeled as picketing, it is outside the publicity proviso

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130 William J. Burns Int’l Detective Agency, 136 N.L.R.B. 431 (1962). Though this case was decided before *Tree Fruits*, *Safeco*, and *DeBartolo II*, an NLRB ALJ has noted that *DeBartolo II* reaffirmed its holding. Newark Morning Ledger Co., 1993 NLRB LEXIS 892, at *17 (Sept. 13, 1993).
132 *Id.* at 432.
133 *Id.*
134 *Id.*
135 *Id.* at 436.
136 *Id.* at 437.
137 *Id.*
138 See Part I.A supra.
and subject to section 8(b)(4)(ii)(B).  

Because it focuses on labeling activity as picketing or not picketing, rather than on whether or not the activity meets the Supreme Court’s standards for what Congress can and cannot regulate, some NLRB officials define an activity as picketing even when it comes close to pure expression. For example, in Brandon Regional Medical Center, one of the handbillers held a handbill up to his chest to show it

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140 See, e.g., Brandon Reg’l Med. Ctr., 2004 NLRB LEXIS 688, at *29-30; Local Union No. 1827, 2003 NLRB LEXIS 256, at *96.

141 See, e.g., Teamsters Local 182 (Woodward Motors), 135 N.L.R.B. 851, 851 n.1, 857 (1962), enforced, 314 F.2d 53 (2d Cir. 1963). In this case, the Board held, and the Second Circuit agreed, that picketing occurred when union members stood two picket signs in snowbanks and sat in cars nearby. Id. at 857. The decision makes sense if limited to its facts: Truck drivers understood the activity to be picketing and did not make deliveries because of it. Id. The union in this case was charged with violating section 8(b)(7)(B) of the NLRA. That section regulates organizational picketing at a primary employer, rather than secondary boycotts. Section 8(b)(7)(B) does not make the kind of distinction that section 8(b)(4) makes between coercive conduct, in section 8(b)(4)(ii)(B), and inducement or encouragement, in section 8(b)(4)(i)(B).

What occurred in Woodward Motors was arguably the latter. In other words, under section 8(b)(4), the “picketing” in Woodward Motors would be “signal picketing,” which does violate section 8(b)(4)(i)(B) but not section 8(b)(4)(ii)(B), and a violation would require an actual work stoppage or picketing on the part of the secondary’s employees. A further explanation of the concept of “signal picketing” occurs in Part II.A infra. Barry Kearney, NLRB Associate General Counsel at the Division of Advice, distinguished Woodward, and noted its particular facts, in an April 2000 advice memorandum which advised that large banners, which unions often use in the same way as inflatable rats, should not be considered pickets. Rocky Mountain Regional Council of Carpenters (Standard Drywall, Inc.), NLRB Advice Memorandum (Apr. 3, 2000), http://www.nlrb.gov/nlrb/shared_files/admemo/admemo/o040300_standard.asp. In a 2004 memorandum, however, Kearney cited the same case, though noting it only applied to certain circumstances, to support the conclusion that the use of an inflatable rat constituted picketing. Discount Drug Mart, NLRB Advice Memorandum (Jul. 22, 2004), http://www.nlrb.gov/nlrb/shared_files/admemo/admemo/8-CA-34716(07-22-04).htm. In the latter memorandum, Kearney also cited Laborers Local 389 (Calcnon Constr.), 287 N.L.R.B. 570 (1987) and Construction & General Laborers Local 304 (Athejen Corp.), 260 N.L.R.B. 1311 (1982). In Calcnon Construction, the Board adopted an ALJ’s decision holding that picketing still occurred even where union members placed signs on the ground rather than holding them. Yet in that case, there were traditional picketers as well, and the union was held to have violated section 8(b)(4)(i)(B) as well as section 8(b)(4)(ii)(B). Calcnon Constr., 287 N.L.R.B. at 574. At hejen Corp. involved similar issues. At hejen Corp., 260 N.L.R.B. at 1319-20. A violation of section 8(b)(4)(i)(B) necessarily incurs a violation of section 8(b)(4)(ii)(B). United Food & Commercial Workers Union, Local 1776 (Carpenter’s Health & Welfare Fund), 334 N.L.R.B. 507, 509 n.8 (2001). This suggests that Calcnon Construction and At hejen Corp. should be strictly limited to their facts and not applied where a union is only charged with a section 8(b)(4)(ii)(B) violation. That NLRB officials cite cases like Woodward Motors, Calcnon Construction, and At hejen Corp. further supports the argument that the NLRB does not use a consistent definition of picketing. In these cases, the NLRB is essentially importing the concept of signal picketing, which is a term of art for a specific type of picketing directed at employees rather than consumers, into its analysis of section 8(b)(4)(ii)(B), where the term does not apply. See Part II.A infra. Activity that is signal picketing under other sections of the NLRA does not necessarily qualify as picketing as Congress envisioned it in writing section 8(b)(4)(ii)(B). Id. Signal picketing need not necessarily combine speech and conduct; it can be pure speech, because section 8(b)(4)(i)(B) only requires that a union “induce” or “encourage” members of other unions to strike their employer. Id. This passes constitutional muster because signal picketing induces conduct that is, in turn, illegal, and so can be outlawed under the Supreme Court’s Brandenburg doctrine. See supra note 60.
The ALJ ruled that this action was similar to wearing a placard, which would classify the action as picketing rather than handbilling. While it may be fair to characterize this activity as picketing, it is picketing stripped of almost all its conduct elements, picketing that approaches a form of pure speech.

Thus, the way the NLRB defines picketing leads to decisions in which union activity that, under the totality of the circumstances, uses speech, rather than conduct, to effect a secondary boycott, is still found to violate section 8(b)(4)(ii)(B). This leads to the NLRB’s current approach to inflatable rats.

G. The NLRB’s Approach to Inflatable Union Rats

When NLRB officials consider inanimate objects like inflatable rats, the picketing characterization makes even less sense than in the examples in the previous section. Inflatable objects do not share many characteristics with picketers. They tend, for example, to stay in one place, rather than patrol, and to remain quiet. Where an inflatable rat is accompanied by behavior like patrolling by human beings, the Division of Advice has argued that this constitutes picketing. In one instance, union members who were handbilling in conjunction with an inflatable rat to passersby. The ALJ ruled that this action was similar to wearing a placard, which would classify the action as picketing rather than handbilling. While it may be fair to characterize this activity as picketing, it is picketing stripped of almost all its conduct elements, picketing that approaches a form of pure speech.

Thus, the way the NLRB defines picketing leads to decisions in which union activity that, under the totality of the circumstances, uses speech, rather than conduct, to effect a secondary boycott, is still found to violate section 8(b)(4)(ii)(B). This leads to the NLRB’s current approach to inflatable rats.

143 Id. at *29.
144 There was no evidence that the union member in question was engaging in other conduct associated with picketing, such as patrolling. Id. at *15. The ALJ noted that patrolling is not essential to picketing. Posting a person at the approach to a business to keep customers away could also be considered picketing. Id. at *27. That definition reflects another weakness of the NLRB’s overall approach to picketing. Both unlawful picketing and lawful handbilling involve posting people at the approaches to a business. The operative difference between picketing and handbilling, according to the NLRB, is a type of expressive activity, that is, whether one hands out a handbill or wears the handbill on one’s chest. This means that in the NLRB’s analysis, the conduct elements of picketing are irrelevant. Yet, it is because of those elements that section 8(b)(4)(ii)(B) reaches picketing.
145 In both of the cases to date in which NLRB ALJs have ruled on the use of inflatable rats, the rats have remained stationary. Laborers’ E. Region Organizing Fund (The Ranches at Mt. Sinai), 2005 NLRB LEXIS 273 (June 14, 2005), aff’d on other grounds, 346 N.L.R.B. No. 105 (2006); Brandon Reg’l Med. Ctr., 2004 NLRB LEXIS 688.
146 N. Cal. Reg’l Council of Carpenters, NLRB Advice Memorandum (Oct. 31, 2002), http://www.nlrb.gov/nlrb/shared_files/admemo/admemo/32-CC-1469(10-31-02).pdf. In this case, there were also union members who patrolled the entrance to the secondary on foot, sang and chanted, and used a bullhorn. Id. This is the kind of conduct that, based on the totality of the circumstances approach, would normally lead to a finding of picketing, even without the presence of a rat. See, e.g., Trinity Bldg. Maint. Co., 312 N.L.R.B. 715, 753-54 (1993) (mass patrolling and shouting through bullhorn taken as evidence of picketing). The reason the use of a bullhorn or loud chanting is seen as evidence of picketing or coercive conduct is that it is held to harass the listener, particularly outside a secondary place of business where people are trying to work. It is the noise, rather than the message of the chanting, that affects the listener, and so the union is resorting to conduct, rather than speech. See infra note 142.
inflatable rat behaved in an aggressive manner, yelling at passersby and patrolling near the rat, which stood near the entrance to the secondary on a narrow city sidewalk. The Division of Advice found that this combination created a gauntlet that made it difficult for customers to enter the secondary and so violated section 8(b)(4)(ii)(B). Here, the Division of Advice’s reasoning is consistent with the DeBartolo II/Thornhill rule because it focuses on conduct that accompanies inflatable rats. However, where an inflatable rat remains stationary and the attendant union members do not conduct themselves in a way that is intended to drive away the secondary’s customers, they do not cross the line that the DeBartolo II court set.

Unfortunately, NLRB officials will sometimes simply look to see whether a union’s behavior bears certain characteristics common to picketing rather than apply the DeBartolo II/Thornhill rule. For example, in Brandon Regional Medical Center the ALJ held that the union used the inflatable rat in a way that was “confrontational rather than informational,” and so its purpose was picketing rather than speech. This argument would make sense if speech and confrontation were mutually exclusive, but they are not. While picketing is a confrontational form of conduct, it does not follow that anything that is confrontational is also conduct. That is to say that confrontation is a necessary condition of picketing, but not a sufficient one. Expressive activity can be confrontational without being transformed into conduct that falls outside First Amendment protection. For example, one might give out a handbill that confronts the reader with facts about a secondary employer; the publicity proviso would still protect the handbilling, despite its confrontational nature. A handbiller would only be subject to section 8(b)(4)(ii)(B)’s sanctions if he or she engaged in particular forms of confrontational conduct, like blocking the entrance to a secondary. A large billboard’s message might confront passersby, but this, too, would get the protection of the publicity proviso. Thus, speech can be confrontational but still immune to

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148 Id.
150 The word “confront” is defined as: “1: to face, esp. in challenge: OPPOSE; 2 a: to cause to meet: bring face-to-face (confront a reader with statistics) b: to meet face-to-face: ENCOUNTER.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (1984) (emphasis added).
151 Grayhawk Dev., Inc., 2005 NLRB LEXIS 17, at *11 (Jan. 13, 2005) (noting that the NLRB has quoted with approval a Second Circuit opinion that held that confrontation is a necessary element of picketing).
154 Overstreet v. United Bhd. of Carpenters, 409 F.3d 1199, 1211 (2005) (noting that
section 8(b)(4)(ii)(B)’s sanctions.\textsuperscript{155} As Part II of this Note will establish, unions use inflatable rats to engage in speech, which means that the rats should come under the publicity proviso of section 8(b)(4)(ii)(B) and so should remain legal to the extent that the First Amendment allows. However, even if the publicity proviso did not exist, section 8(b)(4)(ii)(B) would not automatically proscribe the use of inflatable rats. Even if one were to accept the General Counsel’s assertion that the combination of handbillers and inflatable rats can fairly be characterized as picketing, the issue is whether it is a form of picketing that section 8(b)(4)(ii)(B) actually prohibits. The Supreme Court cases regarding section 8(b)(4)(ii)(B) suggest that the use of an inflatable rat is not the kind of conduct, whether it is labeled picketing or not, that section 8(b)(4)(ii)(B) prohibits. First, the Court held in \textit{Tree Fruits} that not all picketing violates section 8(b)(4)(ii)(B).\textsuperscript{156} Only picketing that threatens, coerces, or restrains a secondary business can violate this section of the statute.\textsuperscript{157} Then, in \textit{DeBartolo II}, the Court established that where a union conducts a campaign regarding a secondary business through pure speech, such as handbilling, the union does not violate the law even where it actually intends to coerce the secondary into cutting off ties with the primary.\textsuperscript{158} According to \textit{DeBartolo II}, the rule of \textit{Tree Fruits} applies to picketing because picketing combines speech with conduct. Where a union’s picketing coerces a secondary by, for example, intimidating customers through conduct like blocking entrances, it violates section 8(b)(4)(ii)(B).\textsuperscript{159} However, even pure speech such as handbilling necessarily involves some form of conduct. For example, handbillers must give out handbills. Where a union places a newspaper advertisement publicizing a secondary’s use of non-union contractors, someone has to engage in the conduct of composing the advertisement and placing it in a

\textsuperscript{155} Where confrontational speech is loud or aggressive enough to be harassing, courts will find that the First Amendment does not necessarily protect it. See, \textit{e.g.}, \textit{Cantwell v. Connecticut}, 310 U.S. 296, 308 (1940) (noting that a speaker would not have been subject to allowable restrictions on the manner of speech because he was not being overly noisy). A law regulating such noise would not be directed at the message of the speech, but the conduct of creating noise. \textit{Id.}

\textsuperscript{156} \textit{NLRB v. Fruit & Vegetable Packers & Warehousemen}, Local 760 (\textit{Tree Fruits}), 377 U.S. 58, 71 (1964).

\textsuperscript{157} \textit{Id.}

\textsuperscript{158} The Court wrote:

\textit{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.}


\textsuperscript{159} \textit{Id.} at 578, 579.
newspaper. However, if the handbill or advertisement is effective in causing a boycott, this is not primarily because of conduct, but rather because of speech or the expression of an opinion. A law that prohibits the conduct involved in giving out a handbill or placing an advertisement would make the First Amendment meaningless.  

The ALJ in Brandon Regional Medical Center wrote that the union’s “conduct in inflating a 16-foot-tall rat” was unlawful.  This is the equivalent of arguing that the “conduct” involved in handing out a handbill violates section 8(b)(4)(ii)(B). Absent a showing of a message that the NLRA could regulate within the Supreme Court’s free speech doctrines, the conduct of merely inflating a rat is not unlawful.  

Thus, whether the General Counsel attempts to apply section 8(b)(4)(ii)(B) to a union’s use of an inflatable rat in a way that regulates the union’s speech or in a way that regulates the union’s conduct, the outcome should be the same, assuming the union’s members behave as they did in Brandon Regional Medical Center. As long as the union does not engage in speech that consists of a true threat, fighting words, or a call to imminent unlawful action, and as long as it does not effect a boycott through conduct like blocking the entrance to a secondary’s place of business, the union should not be held to have committed an unfair labor practice under section 8(b)(4)(ii)(B).  

Apart from the argument that handbillers who work with inflatable rats engage in picketing because they are confrontational, the General

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160 See, e.g., Gold v. NLRB, 407 F. Supp. 2d 719, 726-37 (2005) (rejecting General Counsel’s argument that the kind of conduct involved in setting up a banner subjects it to prohibition, since this would also apply to the conduct involved in giving out handbills). But see Held Properties, Inc., 2004 NLRB LEXIS 159 (Apr. 2, 2004) (holding that the use of a banner was coercive conduct simply because it had a secondary object); analysis of arguments in United Parcel Service in Part II.A supra.  


162 The ALJ in Brandon Regional Medical Center also noted that the inflatable rat was set up “directly in front of the entrance to the hospital.” 2004 NLRB LEXIS 688, at *30. While the rat was in front of the entrance, it was also 100 feet away from it. Id. at *13. This is quite different from an instance where a union inflates a rat so close to a secondary’s entrance that customers cannot get in, let alone a massive picket line in which several hundred union members gather around a secondary employer’s place of business and shout insults. See, e.g., Local 78, Asbestos, Lead, and Hazardous Waste Laborers (Hampshire House), NLRB Advice Memorandum (June 25, 2003), http://www.nlrb.gov/nlrb/shared_files/admemo/admemo/2-CC-2581(06-25-03).htm (rat violated section 8(b)(4)(ii)(B) when placed in a way that, along with union members, created a “gauntlet” that pedestrians had to cross to get into the secondary).  


164 The General Counsel’s Office has only recently adopted the argument that handbillers working with a stationary inflatable rat engage in picketing. Up until the year 2000, the Division of Advice rejected this proposition, and even argued that such behavior was not confrontational. See, e.g., Rocky Mountain Regional Council of Carpenters (Standard Drywall, Inc.), NLRB Advice Memorandum (Apr. 3, 2000) http://www.nlrb.gov/nlrb/shared_files/admemo/admemo/
Counsel has proposed several other arguments for outlawing such activity under section 8(b)(4)(ii)(B). Since there have only been two ALJ decisions regarding the use of inflatable rats, this Note will consider the General Counsel’s remaining arguments within the context of a related issue: unions’ use of large banners in conjunction with handbillers. There is a more extensive record of NLRB case law regarding large banners, which unions use in much the same way as inflatable rats. Consideration of these cases not only offers further proof of how far the General Counsel’s approach is from the DeBartolo II/Thornhill rule, but also helps to establish that the ways in which unions use inflatable rats call for First Amendment protection.

II. THE REASONING NLRB ALJS AND FEDERAL COURTS HAVE USED WITH RESPECT TO LARGE BANNERS AND WHY IT SHOULD APPLY TO INFLATABLE RATS

A. NLRB Decisions Regarding Union Banners in Secondary Campaigns

A recent case, Grayhawk Development, involved facts quite similar to those in Brandon Regional Medical Center: Union members set up a large visible prop about 100 feet from the entrance to a secondary business. The prop in this case was a banner, five feet high and twenty feet long, bearing the words “Shame on Grayhawk Development” and “Labor Dispute.” Several union members accompanied the banner and gave out handbills. In this case,
however, an ALJ rejected the General Counsel’s charge that the union members’ behavior constituted picketing.169 Unlike the ALJ in *Brandon Regional Medical Center*, the ALJ in *Grayhawk Development* held that the union members had not violated section 8(b)(4)(ii)(B), even though their conduct was quite similar to that of the union members in *Brandon Regional Medical Center*.170 The ALJ in *Grayhawk Development* focused on the fact that the union members had not patrolled or blocked the entrance to the secondary.171 This is in contrast to the ALJ in *Brandon Regional Medical Center*, for whom the key inquiry was not into whether the union members engaged in conduct such as physically blocking or patrolling the entrance to the secondary, but simply the union members’ presence, along with the inflatable rat, near the secondary.172

In *Grayhawk Development*, the ALJ also focused on the banner’s immobility, noting that it could not easily be carried by patrolling picketers.173 According to the ALJ, this immobility meant not only that there was no evidence of coercive conduct but also that the use of the banner was an instance of protected speech. Noting that the General Counsel had conceded that if the banner had been a stationary billboard, the union would not have been picking,174 the ALJ held that the banner was the equivalent of a billboard and so was within the publicity proviso.175 Thus, the ALJ’s decision relied on characterization; where a banner is more like a billboard than like a picketer, it is within the publicity proviso.

Six of the nine ALJs who have heard cases involving union banners have ruled that such banners are within the publicity proviso.176

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169 Id. at *12
170 Id.
171 Id. at *7.
174 Id. at *11.
175 Id. at *15. The Division of Advice did consider a case in which a union banner actually became mobile; it was patrolled around the parking lot of a secondary. N. Cal. Reg’l Council of Carpenters, NLRB Advice Memorandum, (Oct. 31, 2002) http://www.nlrb.gov/nlrb/shared_files/admemo/admemo/32-CC-1469(10-31-02).pdf. However, in that case, the banner was accompanied by behavior, like patrolling in formation and noisemaking, that would constitute picketing in any case. Id.
176 Sw. Reg’l Council of Carpenters (*Richie’s Installations*), 2005 NLRB LEXIS 399 (Aug. 22, 2005) (holding that using banners is more akin to using billboards and other protected media than to picketing); Sw. Reg’l Council of Carpenters (*Held Properties, Inc.*), 2005 NLRB LEXIS 168 (Apr. 5, 2005) (banners not akin to picketing because of lack of patrolling; also noting lack of evidence of impact of banners on passersby); Carpenters Local Union No. 1506 (*Sunstone Hotel Investors, LLC*), 2005 NLRB LEXIS 5 (Jan. 6, 2005) (ALJ unwilling to rule that banner was picketing, even where banner was positioned ten feet from the entrance to a secondary, because an unsettled area of law requires caution where a constitutional question may occur); Sw. Reg’l Council of Carpenters (*New Star General Contractor*), 2004 NLRB LEXIS 660 (Nov. 12, 2004)
Three federal district courts and a three-judge panel of the United States Court of Appeals for the Ninth Circuit have ruled this way as well.177 The Division of Advice used to take this position too, but this changed after the year 2000.178

In United Parcel Service, an ALJ did hold bannering to be the equivalent of picketing.179 Since the arguments the General Counsel advanced regarding the banners in that case are similar to those in the cases involving inflatable rats, United Parcel Service will serve to illustrate how the General Counsel’s approach to the use of inflatable rats conflicts with the DeBartolo II/Thornhill rule that allows Congress to regulate conduct broadly, but subjects speech regulations to the First Amendment’s constraints.

In United Parcel Service, the ALJ wrote that bannering had “significant features akin to picketing: a visual message comprehensible at a glance and notice of a labor dispute.” 180 This reasoning parallels (with one banner only eight feet away from secondary’s entrance, ALJ held that the banners were more like billboards than traditional picket signs and were not accompanied by conduct intended to keep customers or others away from the secondary regardless of the ideas expressed); and Sw. Reg’l Council of Carpenters (Carignan Constr. Co.), 2004 NLRB LEXIS 74 (Feb. 18, 2004) (holding that the banners were more like billboards that pickets). The three cases in which ALJs held that bannering did violate section 8(b)(4)(ii)(B) were Mid-Atlantic Reg’l Council of Carpenters (Starkey Constr. Co.), 2006 NLRB LEXIS 80, at *53 (Mar. 2, 2006) (citing Justice Black’s Tree Fruits concurrence to support conclusion that union members who stand near a banner are picketing); Held Properties, Inc., 2004 NLRB LEXIS 159 (Apr. 2, 2004); and Local Union No. 1827, United Bhd. of Carpenters & Joiners (United Parcel Serv.), 2003 NLRB LEXIS 256 (May 9, 2003) (use of banners constituted picketing because banners were visually dramatic, constituted “signal pickets”, and were confrontational in nature). Since many of these cases involved the same union as Grayhawk Development, the facts in the cases, including the dimensions and wording of the banners and the behavior of the union members who accompanied them were quite similar.

177 See Gold v. Mid-Atlantic Reg’l Council of Carpenters, 407 F. Supp. 2d 719 (D. Md. 2005) (rejecting all of the General Counsel’s arguments that using banners is coercive conduct); Benson v. United Bhd. of Carpenters, 337 F. Supp. 2d 1275 (D. Utah 2004) (holding that bannering is the “functional equivalent” of handbilling); Overstreet v. United Bhd. of Carpenters, No. 03-0773 J (JFS), 2003 U.S. Dist. LEXIS 19854 (S.D. Cal. 2003) (holding that the banners were stationary and there was no confrontational conduct), aff’d, 409 F.3d 1199 (9th Cir. 2005).

Where an NLRB officer, after investigating a complaint, decides there is reason to believe an unfair labor practice under section 8(b)(4)(ii)(B) has occurred, the NLRB is required to petition the federal district court where the unfair practice is alleged to have occurred for a temporary injunction or restraining order so that the unfair practice will be halted until the ALJ can rule on the issue. 29 U.S.C. § 160(l) (2000). The federal courts only apply a “reasonable cause to believe that a violation has occurred” standard, while the NLRB ALJs apply a preponderance of the evidence standard. New Star Gen. Contractors, 2004 NLRB LEXIS 660, at *78-79 (Nov. 12, 2004). Also, the federal decisions do not constitute binding authority with respect to NLRB decisions. Id. Still, NLRB ALJs do consider the federal decisions to be persuasive. Id.


179 United Parcel Serv., 2003 NLRB LEXIS 256.

180 Local Union No. 1827, United Bhd. Of Carpenters, 2003 NLRB LEXIS 256, at *91
the General Counsel’s argument that an inflatable rat is a “symbol of a labor dispute” and thus the “functional equivalent” of picketing.\footnote{See Press Release, supra note 3.} Thus, in the ALJ’s view, banners and rats send the message that there is a labor dispute and so are the equivalent of picketing. Yet, by this logic, handbills should also be prohibited, since the handbills send the same message.\footnote{See also Gold v. NLRB, 407 F. Supp. 2d 719, 727 (D. Md. 2005) (noting that handbillers who fervently give out handbills might create an even greater symbolic barrier but would be protected under DeBartolo II); Brief of Respondent-Appellant at 32, The Ranches at Mt. Sinai, 2006 NLRB LEXIS 167 (arguing that publicizing a labor dispute is lawful activity).} To argue that an item should be banned because of what it symbolizes is to argue for regulation of the content of its message. This argument is inconsistent with the Supreme Court’s First Amendment doctrine.\footnote{See, e.g., Police Dep’t of Chi. v. Mosley, 408 U.S. 92, 96 (1972) (holding unconstitutional an ordinance that “describes impermissible picketing . . . in terms of subject matter”).} The DeBartolo II/Thornhill rule eschews such content-based regulation by focusing on the conduct element of picketing rather than on expression. The ALJ, by contrast, focused on aspects of picketing—a visual message and notice of a labor dispute—that express ideas. To argue, then, that an inflatable rat is the equivalent of picketing because it has in common with picketing characteristics that are purely functions of expression does not address the DeBartolo II/Thornhill rule, because such aspects of picketing receive First Amendment protection.

The ALJ in United Parcel Service also wrote that “confrontation in the sense of assertive or aggressive behavior is not a necessary element of picketing.”\footnote{United Parcel Serv., 2004 NLRB LEXIS 256, at *94. It is not clear that the case the ALJ relies upon to support this assertion actually addresses that particular issue. Women & Infants Hosp., 324 NLRB 743, 749 (1997).} This assertion illustrates another way in which NLRB officials misread the Supreme Court’s decisions on picketing. The Court established in Tree Fruits that peaceful picketing does not necessarily violate section 8(b)(4)(ii)(B).\footnote{NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits), 377 U.S. 58, 71 (1964).} It is difficult to see how picketing that lacks “assertive or aggressive” behavior like the blocking of entrances to a building could violate section 8(b)(4)(ii)(B) without a further showing that the picketing threatens to shut down a secondary’s entire business, as in Safeco.\footnote{Id. at 615. Moreover, DeBartolo II calls into question whether peaceful picketing should be outlawed even if it does threaten to shut down a secondary entirely. Also, as noted supra in Part I.G, even if the use of an inflatable rat might fairly be labeled “picketing,” that labeling does not end the inquiry; such picketing would still need to achieve a secondary boycott through conduct in order to violate section 8(b)(4)(ii)(B).} The argument that confrontation without aggressive behavior, or conduct, can violate section
8(b)(4)(ii)(B) recalls the General Counsel’s argument in *Brandon Regional Medical Center* that the existence of confrontation establishes that regulatable conduct has occurred, despite the fact that confrontation can be achieved through protected speech alone.\(^{187}\) Whether applied to banners or inflatable rats, this argument fails to establish an section 8(b)(4)(ii)(B) violation.

In contrast to the ALJ, a Ninth Circuit panel that considered the General Counsel’s petition for a preliminary injunction in *United Parcel Service* rejected the General Counsel’s arguments.\(^{188}\) The Ninth Circuit ruled that the union’s banners were well within the coverage of the First Amendment and the publicity proviso.\(^{189}\) In so doing, the court rejected another of the arguments that the ALJ would later accept: That a banner is distinguishable from a handbill because it is “comprehensible at a glance”\(^{190}\) and “visually dramatic.”\(^{191}\) Here, the characterization of an activity as picketing rests solely on the efficiency and drama with which the medium conveys the message.\(^{192}\) Under this reasoning, a visually dramatic billboard would also be unlawful. The *DeBartolo II* court specified that all types of advertising media come under the publicity proviso.\(^{193}\) This was because the Court was not concerned with the kind of media unions use to convey their messages but rather with the incidental behavior of those union members who convey the message.\(^{194}\)

In considering *United Parcel Service*, the Court of Appeals echoed this argument.\(^{195}\) Thus, efficiency of communication does not seem any

\(^{187}\) *See infra* Part I.F.

\(^{188}\) Overstreet v. United Bhd. of Carpenters, 409 F.3d 1199 (9th Cir. 2005).

\(^{189}\) *Id.* at 1214.

\(^{190}\) Local Union No. 1827, United Bhd. of Carpenters, 2003 NLRB LEXIS 256, at *91 (May 9, 2003).

\(^{191}\) *Id.* at *92.

\(^{192}\) Similarly, the ALJ who heard *Brandon Regional Medical Center* noted the difference between a handbill that is held out to passersby and one that is held up to the handbiller’s chest in the manner of a picket sign. *Brandon Reg’l Med. Ctr.*, 2004 NLRB LEXIS 688, at *29 (Dec. 7, 2004), aff’d on other grounds, 346 N.L.R.B. No. 22 (Jan. 9, 2006).


\(^{194}\) *Id.*

\(^{195}\) Overstreet v. United Bhd. of Carpenters, 409 F.3d 1199, 1211 (9th Cir. 2005) (citing Cochran v. Veneman, 359 F.3d 263 (3d Cir. 2004), which applied First Amendment principles to two-word billboards: “got milk?”). Even the Division of Advice has written that the “pithiness” argument would fail if applied to inflatable rats. UNITE, NLRB Advice Memorandum (Apr.1, 2004), http://www.nrlb.gov/nlrb/shared_files/admemo/admemo/5-CC-1278(04-01-04).pdf. In that case, the Division of Advice was considering a union’s use of two fifteen-foot-tall puppets during a demonstration. *Id.* The memorandum differentiated the use of such puppets from the use of an inflatable rat, likening it instead to the use of large, inflatable props in the shape of a skunk or Uncle Sam. *Id.* In the latter case, as in the case of the puppets, the Division argued that the point of such a prop would merely be to draw attention, rather than to create the “invisible picket line” that an inflatable rat would create because, unlike the other props, a rat is a “well-known symbol of a labor dispute.” *Id.* Thus, the Division of Advice seems to have conceded a point that unions have made in cases involving inflatable rats; that is, that the point of using such
more likely than the content of the message itself to establish that banners or inflatable rats should be banned.\textsuperscript{196}

The Ninth Circuit also rejected two related arguments that the General Counsel made regarding the banners. Though these arguments do not invoke First Amendment’s protection of expression, these arguments have been applied to inflatable rats and can cause confusion about the operation of section 8(b)(4)(ii)(B) and so should be addressed briefly. First, the General Counsel argued that bannering constitutes a particular form of picketing known as “signal picketing.” “Signal picketing,” however, is a term of art that only applies to particular circumstances, when a union tries to induce the unionized employees of a secondary either to stop work or to picket in violation of section 8(b)(4)(i)(B). The Ninth Circuit pointed out that the term “signal picketing” did not apply to the Carpenters’ banner, which was directed at the general public, not secondary employees.\textsuperscript{197}

\textsuperscript{196} See Brief of Respondent-Appellant at 5, The Ranches at Mt. Sinai, 2006 NLRB LEXIS 167 (Jun 14, 2005) (arguing that speed with which communication is made is not a relevant issue).

\textsuperscript{197} Overstreet v. United Bhd. of Carpenters, 409 F.3d 1199, 1215 (9th Cir. 2005). Where a union engages in “signal picketing,” it only has to engage in speech, that is, send a signal, in order to violate the law. Overstreet, 409 F.3d at 1215. However, that speech must be directed at other union members, not the public in general. \textit{Id.} Signal picketing doctrine rests on the fact that unions are able to enforce sanctions against union members who do not comply with the signals. \textit{Id.} Because it is backed by such sanctions, sending a signal—a form of pure speech—forcefully induces the kind of conduct that section 8(b)(4) is intended to outlaw; however, this is only true where the signal is directed at other union members. \textit{Id.} In such a case, the signal would violate section 8(b)(4)(i)(B)’s prohibition against union actions that “induce or encourage” employees of secondaries to stop work. 28 U.S.C. 158(b)(4)(i)(B) (2000). In general, where unions handbill in conjunction with rats, they will include on the handbills a disclaimer aimed at avoiding a section 8(b)(4)(i)(B) violation. See, e.g., Brandon Reg’l Med. Ctr., 2004 NLRB LEXIS 688, at *17 (Dec. 7, 2004) (handbill included language stating that it “does not intend, nor does it ask any employee to cease work or cease deliveries, nor does it ask anyone to take any action against Workers Temporary Staffing or Brandon Regional Hospital”); The Ranches at Mt. Sinai, 2005 NLRB LEXIS 273, at *8 (“We are not asking other employees of other employers to stop work”). The term does not describe “signals” sent by union members to the general public or consumers entering a business—that is, the intended audience of the Carpenters’ banners and the rat in Brandon Regional Medical Center. The ALJ’s in most of the other banner cases also rejected this argument. See, e.g., Sw. Reg’l Council of Carpenters (Richie’s Installations), 2005 NLRB LEXIS 399, at *25-26 (Aug. 22, 2005); Grayhawk Dev., Inc., 2005 NLRB LEXIS 17, at *12-13 (Jan. 13, 2005); see also Bock, supra note 15, at 930-45 (explaining signal picketing doctrine). It may be that signal picketing arguments appear in section 8(b)(4)(ii)(B) cases because the General Counsel first used a number of the arguments advanced for outlawing inflatable rats under section 8(b)(4)(ii)(B) in a memorandum that addressed only the issue of signal picketing. See, e.g., Press Release, supra note 3 (arguing that an inflatable rat is a “symbol of a labor dispute” that creates the assumption of a picket line); Discount Drug Mart, Inc., NLRB Advice Memorandum (July 22, 2004), http://www.nlrb.gov/nlrb/shared_files/admemo/admemo/8-ca-34716(07-22-04).pdf
The ALJ in *United Parcel Service* also held that the union’s banners were deceptive because they might lead an observer to conclude that the union’s dispute was with the secondary rather than the primary.¹⁹⁸ This argument relied on the fact that the banners featured the name of the secondary and the phrase “Labor Dispute.” The Ninth Circuit, as well as other ALJs who heard bannering cases, did not agree with this reasoning either, holding that the banners were not deceptive because the term “labor dispute” accurately describes both secondary and primary union campaigns.¹⁹⁹ Still, the Division of Advice has used this rationale to support the argument that inflatable rats violate section 8(b)(4)(ii)(B).²⁰⁰ This argument should fail for the same reason that the Ninth Circuit rejected it.

In sum, because it applied the *DeBartolo II/Thornhill* rule, the Ninth Circuit rejected the arguments that the ALJ accepted in characterizing the use of banners as picketing. The Ninth Circuit looked to whether the union was using conduct, rather than the expression of an idea, to effect a secondary boycott. The ALJ, however, looked instead toward parallels between bannering and picketing, parallels that, particularly in the case of signal picketing, are not relevant to whether or not bannering should be prohibited under section 8(b)(4)(ii)(B). While federal courts would normally defer to the findings of agencies charged with administering federal laws,²⁰¹ in this case the courts were considering an area in which they owe no deference to the NLRB: First Amendment jurisprudence.²⁰² However,

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¹⁹⁸ *United Bhd. of Carpenters & Joiners (United Parcel Serv.),* 2003 NLRB LEXIS 256, at *115-16 (May 9, 2003)


²⁰¹ See, e.g., *DeBartolo II,* 485 U.S. at 574.

²⁰² *Overstreet,* 409 F.3d at 1208 n.12 (“This case’s First Amendment backdrop prevents us
federal court decisions on preliminary injunctions do not carry precedential weight in NLRB ALJ determinations, nor do the decisions of other ALJs; the ALJs must only follow Board decisions, and the Board has not yet decided the status of inflatable rats under section 8(b)(4)(ii)(B). Thus, it is up to the Board to finally determine whether or not the General Counsel’s arguments are persuasive. Given that NLRB ALJ’s have made contradictory rulings regarding both rats and banners in cases involving similar facts, the Board should, as one of the ALJs, noted, make a definitive ruling on the subject.

B. Why Inflatable Rats Are Analogous to Banners

Given the arguments above for the proposition that large stationary banners come under the publicity proviso, the next question to address is: Are large inflatable rats similar enough to banners that they, too, should come under the publicity proviso? There are several sources of support for this argument; the first is section 8(c) of the NLRA. This section is usually applied in the context of union certification elections, where employers will often give various written or printed materials to employees in a potential bargaining unit in an effort to campaign against the organizing drive. As long as the materials do not threaten reprisal or promise benefit, they will not violate the law. Leaving aside for the moment the question of whether or not it is appropriate to apply section 8(c) directly to a circumstance outside such contexts, like a secondary

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203 Carpenters Local Union No. 1506 (Sunstone Hotel Investors, LLC), 2005 NLRB LEXIS 5, at *46-49 (Jan. 6, 2005). The Board’s decisions in Brandon Regional Medical Center and Laborer’s Eastern Region Organizing Fund declined to address the question of whether or not the inflatable rat constituted a prohibitable picket. Id.

204 The Board’s decision may then be appealed to a Circuit Court of Appeal and ultimately to the Supreme Court. NAT’L LABOR RELATIONS BD., supra note 14, at 39.

205 See supra note 178.

206 Sunstone, 2005 NLRB LEXIS 5, at *61.

207 Section 8(c) states: The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act] subchapter, if such expression contains no threat of reprisal or force or promise of benefit. 29 U.S.C. § 158(c) (2000).

208 See, e.g., 4-34 NATIONAL LABOR RELATIONS ACT; LAW AND PRACTICE § 34.01 (2005) (considering section 8(c) only in the context of certification elections); Rebecca Hanner White, The Statutory and Constitutional Limits of Using Protected Speech as Evidence of Unlawful Motive Under the National Labor Relations Act, 53 OHIO ST. L.J. 1 (1992) (reviewing cases in which section 8(c) was analyzed, all of which were in the election context). However, there is support for the argument that section 8(c) applies outside the certification election context. See infra Part III.A.
publicity campaign, the section does at least provide some guidance about how Congress views certain types of visual materials in the context of the NLRA. Congress included the terms “written, printed, graphic or visual form” in the list of items in section 8(c). This suggests that a visual form like an inflatable rat, particularly one like the rat at Brandon Regional Medical Center, which also featured writing across its chest, should receive the same treatment as a written, printed item like a banner or handbill. A recent decision by the Court of Appeals for the Sixth Circuit supports this contention, holding that an inflatable rat is a form of protected speech under the First Amendment.

A number of NLRB decisions also lend support to the assertion that a rat is functionally similar to a banner because it serves to communicate ideas. The NLRB General Counsel, in his May 2003 report, wrote that a rat set up near the entrance to a worksite is “a symbol of a labor dispute.” The Division of Advice, addressing the same case, wrote, “Unions’ use of the term rat and rat caricatures to convey to the general public that an employer operates non-union or otherwise fails to meet area standards has been well-documented.” In yet another ALJ decision regarding a rat, a non-union contractor testified that “the rat symbolizes that a nonunion company is working at the targeted jobsite.” This is in agreement with a union member’s testimony in the same case that “people in the union construction industry view a rat at a construction site as signifying that there is a ‘problem.’” As the various quotations above show, a rat’s function is symbolic—it sends a message that a union has a dispute with an employer.

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210 Tucker v. City of Fairfield, 398 F.3d 457 (6th Cir. 2005). In granting a union’s petition for an injunction against the application of a local ordinance prohibiting structures in a city’s right-of-way to a rat, the court wrote, “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, especially given the symbol’s close nexus to the Union’s message.” Id. at 462. The court also cited a similar opinion in Int’l Union of 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.”).
211 Press Release, supra note 3 (emphasis added).
212 Sheet Metal Workers, Local 15, Brandon Regional Hospital, NLRB Advice Memorandum, at n.4 (Apr. 4, 2003), http://www.nlrb.gov/nlrb/shared_files/admemo/admemo/12-cc-1258(04-04-03).pdf (emphasis added).
213 Laborers’ E. Region Organizing Fund (The Ranches at Mt. Sinai), 2005 NLRB LEXIS 273, at *29 (June 14, 2005) (emphasis added) A number of other employers testified that in their view, the rat was “synonymous with a picket.” Id. at *28. However, this is not necessarily dispositive of the disposition of a rubber rat, since the specific definition of “picket” is not necessarily clear—the employers may well have used the term for any sort of union action, even permissible handbilling.
214 Id. at *42 (emphasis added).
215 See also Brief of Respondent-Appellant, The Ranches at Mt. Sinai, 2006 NLRB LEXIS
The quotes above establish that inflatable rats serve to communicate ideas. So inflatable rats, like banners and handbills, should be within the publicity proviso of section 8(b)(4). Thus, when unions use inflatable rats in conjunction with handbillers, they do not, without additional conduct, violate section 8(b)(4)(ii)(B). This is because *DeBartolo II* establishes that the mere presence of union members near the entrance to a secondary does not mean that the members have engaged in picketing.\(^{216}\) In order to engage in protected activity like handbilling, the union members would have to be posted somewhere near the approach to the secondary’s place of business. Thus, it is consistent with the Supreme Court’s reasoning to infer that handbillers should only be considered to have engaged in unlawful conduct if they physically block or patrol the entrance to a secondary. Adding a stationary expressive item like a banner or a rat should not change this analysis, as long as the item does not itself block or patrol the secondary’s entrance either. Ruling otherwise would raise the danger of placing section 8(b)(4)(ii)(B) in conflict with the First Amendment, because the statute would thus be construed as regulating speech rather than conduct.

III. SECTION 8(c) INDICATES THE SCOPE OF SECTION 8(b)(4)(ii)(B) IN CASES INVOLVING VISUAL MEANS OF EXPRESSION

A. Section 8(c) Reads the *DeBartolo II* / Thornhill Rule Into the NLRA

In order to comply with *DeBartolo II*’s revival of the *Thornhill* rule regarding picketing, the NLRB may need to change some of the definitions of picketing that it has used in the cases mentioned above. How the NLRB will address all the various ways in which a union might picket is beyond the scope of this Note. However, where unions employ visual means of expression like inflatable rats, the NLRA already includes specific congressional guidance as to the appropriate definition of picketing. The wording, legislative history of, and Supreme Court rulings on section 8(c) reveal that where the NLRB considers an issue involving a visual form like a depiction of a rat, it must take section 8(c) into account.\(^{217}\) Since, as established above in Part II.B, an inflatable rat expresses an opinion in visual form, section 8(c) dictates that an inflatable rat cannot constitute or even serve as evidence of an unfair labor practice unless it threatens reprisal or force

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167 (citing evidence of the symbolic nature of an inflatable rat).
217 For the text of Section 8(c), see *supra* note 207.
2006]  GIANT INFLATABLE RAT 1557

or makes a promise of benefit.218

Congress enacted section 8(c) in order to ensure that the Board’s
decisions would take the First Amendment’s free speech guarantees into
account.219 That enactment came in reaction to a number of cases in
which the Board placed strict limits on speech by employers.220 The
Supreme Court had already ruled that some of those NLRB decisions
violated the First Amendment.221 Congress then enacted section 8(c) in
order to codify the Supreme Court’s rulings into the statute.222

As noted above in Part II.A, the NLRB will need to resolve the
differences in outlook between ALJs on the subject of whether or not
rats and banners can constitute unlawful pickets. In doing so, the Board
must consider not only section 8(b)(4)(ii)(B) but also section 8(c).
Otherwise, the Board will not be giving the statute the full effect that
Congress intended. In addition, the Board will risk making a decision
that violates the First Amendment.

Some commentators have noted that Congress was specifically
concerned with speech by employers during union certification election
campaigns when it passed the bill that resulted in section 8(c).223
However, there is a good deal of support for the argument that section
8(c) should apply in other types of cases as well. First, the plain
language of the section does not limit its application to the certification
election context. Rather, it applies to “any of the provisions” of
subchapter 8, of which section 8(b)(4)(ii)(B) is a part.224 In addition,
the legislative history of the Taft-Hartley Act, which amended section
8(c) to the NLRA, indicates that its sponsors, while certainly concerned
with the issue of employer speech during certification elections,
specified that the section’s protections apply to unions and employees
as well.225

219 H.R. REP. NO. 80-245, at 6 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE
LABOR MANAGEMENT RELATIONS ACT, 1947, at 292, 297 (1948) (committee report asserting
that the language of what became section 8(c) “guarantees, to employees, to employers, and to
their respective representatives, the full exercise of the right of free speech”).
220 See, e.g., Andrias, Note, A Robust Public Debate: Realizing Free Speech in Workplace
Representation Elections, 112 YALE L.J. 2415, 2422-31 (2003). The NLRB had placed restrictions on
the kinds of speech employers could engage in to dissuade employees from voting to join a union during an
NLRB-administered certification election. Id. at 2422-24.
221 Id. at 2425.
222 See, e.g., 80 CONG. REC. 2080 (1947) (Senate report describing the intent of the
amendment that would become section 8(c) as that of writing “into the statute the present decision
rules applied by the courts”); see also NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969)
(holding that section 8(c) “implements the First Amendment.”).
223 See, e.g., Andrias, supra note 220, at 2427.
225 See, e.g., 80 CONG. REC. 2080 (1947) (“The amendment guarantees freedom of speech by
employers and all other persons affected by the act”) (emphasis added); id. at 6443 (“Subsection
(c) relating to the right of employers, employees, and labor organizations to express opinions and
The Supreme Court, in considering the interaction of section 8(c) and section 8(b)(4)(ii)(B), has ruled that the former section does not protect picketing that would be unlawful under the latter.\textsuperscript{226} However, that ruling rested on the understanding, established in earlier cases, that the First Amendment does not protect all forms of picketing.\textsuperscript{227} Since the cases the Court cited, such as \textit{Hughes v. Superior Court of California}\textsuperscript{228} and \textit{Giboney},\textsuperscript{229} relied on the concept that picketing involves more than speech, they do not apply where a union engages only in speech, as when it uses a banner or a rat without patrolling or other conduct.\textsuperscript{230} Where speech is not accompanied by prohibited conduct the First Amendment should apply. Because of this, in at least one case, a federal court has specifically declared that section 8(b)(4)(ii)(B) must be considered in conjunction with section 10(c).\textsuperscript{231}

The Supreme Court has recognized that section 8(b)(4)(ii)(B) balances two congressional objectives: Allowing unions to bring pressure against primary employers and allowing secondary businesses to avoid getting enmeshed in such disputes.\textsuperscript{232} Section 8(c) reveals yet another congressional objective: Ensuring that the NLRB does not make rulings that could come into conflict with the Supreme Court’s First Amendment jurisprudence. When the Board considers a case involving an expressive medium which uses an image to communicate an idea, it must act in a way that achieves the congressional objective behind section 8(c). This means that where the court is balancing the competing interests of unions and secondaries, a union’s use of an expressive image should tip the balance in favor of allowing the union to use it, as long as the image does not violate the restrictions that Congress has placed on pure speech.

\textsuperscript{226} IBEW v. NLRB, 341 U.S. 694 (1951). In this case, the prohibition on picketing that the Court considered was in section 8(b)(4)(A), the predecessor to section 8(b)(4)(ii)(B) before the 1959 amendments to the NLRA that produced the latter section. \textit{Id} at 698.

\textsuperscript{227} \textit{Id.} at 705.

\textsuperscript{228} Hughes v. Superior Court of Cal., 339 U.S. 460 (1950).

\textsuperscript{229} \textit{Giboney} v. Empire Storage & Ice Co., 336 U.S. 490 (1949).


\textsuperscript{231} Little v. Local 481, Int’l Bhd. Of Elec. Workers, No. ID-62-c-81, 1962 U.S. Dist. LEXIS 4305, at *5-6 (S.D. Ind. Apr. 25,1962) (holding, in a ruling denying the General Counsel’s petition for a temporary injunction under section 10(l), that “Congress did not intend by incorporation of the (ii) addition to Section 8(b)(4) of the Act to limit free speech of unions or their representatives as specifically permitted in Section 8(c)”).

B. An Inflatable Rat Does Not, by Itself, Threaten Reprisal or Force or Promise a Benefit

The language of section 8(c) does exempt from its coverage certain expressive content, for example, that which threatens reprisal or force. Where a union uses an inflatable rat in a secondary campaign, the relevant issue should be whether the rat threatens the use of force or retaliation. Under existing Board law, it would be difficult to argue that the mere presence of a rat constitutes a threat. In cases involving secondary businesses, the NLRB has refused to hold that even vaguely threatening statements constitute unlawful threats under the prohibitions of section 8(b)(4)(ii)(B). If statements to the effect that an employer “will be sorry” for not listening to the union do not constitute threats, it is difficult to see how merely truthfully stating that a given employer does not pay prevailing wages, which is the message a rat is designed to send, could possibly be considered a threat.

Under the same standard, the mere presence of an inert inflatable prop, unaccompanied by threatening activity by patrolling picketers, should not constitute a threat of coercion against the customers of a secondary business. In at least one case, a witness for the General Counsel testified that the sight of an inflatable rat at a job site causes people to be concerned about violence. However, the First Amendment requires more than such subjective fears, unsupported by evidence of any aggressive action by the union members accompanying the inflatable rat, before government can regulate the use of an

233 In this, the section reflects Supreme Court rulings that establish that a narrow category of threatening, abusive speech, does not merit First Amendment protection. See, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940) (“Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . . .”)

234 This exclusion, however, is not relevant in the context of an alleged section 8(b)(4)(ii)(B) violation. A promise of benefit is unlawful in the context of a union certification election. During the campaign for such an election, it would unlawful for either party to promise employees a benefit if they were to vote in a particular way. See, e.g., NAT’L LABOR RELATIONS BD., supra note 14, at 17. Section 8(b)(4)(ii)(B) makes no mention of promises of benefit. 29 U.S.C. § 158(b)(4)(ii)(B).

235 SEIU Local 585 (Quality Services), NLRB Advice Memorandum (Apr. 9, 2003), http://www.nlrb.gov/nlrb/shared_files/admemo/admemo/dd042903_quality.asp?bhcp=1 (“Vague allusions to ‘problems,’ ‘trouble,’ and the like, without more, are not violative because they do not clearly refer to unprotected activities”).


237 Laborers’ E. Region Organizing Fund (The Ranches at Mt. Sinai), 2005 NLRB LEXIS 273, at *34 (June 14, 2005). The witness was an officer of an employers’ association, some of whose members had had inflatable rats erected at their places of business. Id. at *33. In fact, all of the witnesses cited in the case were affiliated with either a union or an employer; none were individuals with no involvement in labor-management disputes. Id. at *27-49.
expressive object. After all, the Supreme Court has refused to rule that even an object as fraught with menace as a burning cross can necessarily be banned unless there is evidence of an intent to intimidate.239 Where, as in most of the cases involving inflatable rats, unions have asserted an intent to inform rather than intimidate and have taken steps to make sure that their members do not act in an intimidating way,240 section 8(c) should apply.

Thus, section 8(c) applies the First Amendment’s protections, in the form of the DeBartolo II/Thornhill rule, to expressive visual images like that of an inflatable rat. Where such an item is not accompanied by the kinds of conduct that would violate section 8(b)(4)(ii)(B), section 8(c) dictates that the NLRA does not regulate its use.

CONCLUSION

In January of 2006, the NLRB issued a Board decision affirming the ALJ’s holding that the Sheet Metal Workers had engaged in unlawful picketing at Brandon Regional Medical Center.241 However, the Board did not base its decision on the use of the inflatable rat and it declined to rule on that question.242 In a subsequent decision involving an inflatable rat, the Board again declined to address the issue.243 Thus, the question of whether or not the General Counsel’s approach to inflatable rats correctly states the law remains unresolved. In the meantime, unions have been considering using alternatives like inflatable skunks or cockroaches.244

The unions, however, should not have to create new inflatable animals. Inflatable rats should come under the publicity proviso of section 8(b)(4)(ii)(B) of the NLRA because section 8(b)(4)(ii)(B) regulates conduct and exempts speech, as the Supreme Court cases regarding section 8(b)(4)(ii)(B) establish and cases regarding the use of large banners recognize. Section 8(c) and other sources establish that

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239 Virginia v. Black, 538 U.S. 343, 365 (2003) (holding that a state statute that took the fact of a cross-burning was prima facie evidence of an intent to intimidate was overbroad, since a cross can be burned without such intent); see also Brief of Respondent-Appellant at 41, The Ranches at Mt. Sinai, 2006 NLRB LEXIS 167 (arguing that an inflatable rat is not per se coercive or intimidating).

240 See, e.g., Brandon Reg’l Med. Ctr., 2004 NLRB LEXIS 688, at *25 (union’s intention in setting up an inflatable rat was to gain the public’s attention).


242 Id. at 2 n.3.

243 The Ranches at Mt. Sinai, 2006 NLRB LEXIS 167.

244 Darren Dahl, Blow-up Rats Face Extermination, INC. MAGAZINE, Dec. 2005, at 34. The impetus for this approach seems to have come from the April 1, 2004 Advice Memorandum, supra note 195, which noted that because skunks are not well-known symbols of labor disputes, inflatable versions of them would not create “invisible” picket lines.
rats should be regarded as a form of pure speech equivalent to banners, and should thus come under the publicity proviso to section 8(b)(4)(ii)(B). Moreover, even if the NLRB were to consider only the conduct unions engage in when they use inflatable rats, section 8(b)(4)(ii)(B) would still not outlaw such conduct. The NLRB should rule against the use of rats only when they are deployed in a way that physically blocks or is intended to intimidate a secondary’s customers.

In considering a union secondary campaign aimed at the general public, NLRB officials should apply the following test: First, they should look to see whether a union is engaging in speech or in conduct in order to effect the campaign. A union will be engaged in speech if it is attempting to achieve its goals through the dissemination of ideas. If this is the case, section 8(c) dictates that as long as this speech does not threaten the use of force or retaliation, the speech should be permitted. If, on the other hand, the union is relying on conduct instead of or in addition to speech in order to further its campaign, then the issue will become whether or not such conduct has the effect of coercing, restraining, or threatening the secondary. If any of these are true, then the union will have committed an unfair labor practice under section 8(b)(4)(ii)(B). By applying this test, the NLRB will ensure that its decisions not only achieve the goals Congress intended in enacting the NLRA, but also that its decisions fall within the limits of the First Amendment.