

## UNDER (SECONDARY) PRESSURE: SCABBY THE RAT'S FUTURE UNDER § 8(B)(4) OF THE NLRA

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### INTRODUCTION

On December 13, 2019, Administrative Law Judge Sorg-Graves held that a union's use of a twelve-foot inflatable rat did not threaten, coerce, or restrain engagement with a secondary employer in violation of Section 8(b)(4) of the National Labor Relations Act.<sup>1</sup> Sorg-Graves's decision is one of the latest stemming from a surge of recent NLRA complaints involving the use of the inflatable rat, famously coined Scabby the Rat, against secondary employers.<sup>2</sup> Behind many of these cases is Peter Robb—NLRB General Counsel—who has fought vehemently to categorize Scabby as unlawful under the NLRA, and eradicate its use altogether.<sup>3</sup> Although he faces decades of court and NLRB precedent permitting Scabby to join unions on strike, Robb's extermination campaign has already set up a larger fight over union actions and free speech.<sup>4</sup>

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<sup>1</sup>Int'l Union of Operating Eng'rs, Local 150 (Donegal Servs.), 13-CP-227526, 2019 WL 6838679 (N.L.R.B. Div. of Judges Dec. 13, 2019).

<sup>2</sup>See, e.g., *King v. Constr. & Gen. Bldg. Laborers' Local 79, Laborers Int'l Union of N. Am.*, 393 F. Supp. 2d 181, 201–02 (E.D.N.Y. 2019) (holding that use of inflatable rats and cockroaches neither constitute picketing nor amount to unlawful coercion); *Int'l Bhd. of Elec. Workers, Local 98 (Fairfield Inn)*, 04-CC-223346, 2019 WL 2296952 (May 28, 2019) (holding that a stationary inflatable rat with no message attached did not amount to unlawful picketing or coercion).

<sup>3</sup>Hassan A. Kanu, *Death to Scabby: Trump Labor Counsel Wants Protest Icon Deflated*, BLOOMBERG LAW (Jan. 22, 2019), <https://news.bloomberglaw.com/daily-labor-report/death-to-scabby-trump-labor-counsel-wants-protest-icon-deflated>.

<sup>4</sup>See Michael Gold, *Scabby, the Giant Inflatable Union Protest Rat, Faces Extermination*, THE NEW YORK TIMES (July 31, 2019), <https://www.nytimes.com/2019/07/31/nyregion/rat-balloon-union.html>.

Beginning around 1990, unions across the country started to use Scabby and other similar inflatables<sup>5</sup> to garner attention and send a message to employers and the public about their labor disputes.<sup>6</sup> Until now, the NLRB has upheld the use of the rat and other inflatable figures as symbolic speech that is not unlawful under the NLRA.<sup>7</sup> But the five-member labor board, currently controlled by a pro-employer Republican party, may be Robb's only realistic opportunity to overturn NLRB precedent and ban Scabby from picket lines across the country.<sup>8</sup>

The NLRA protects the rights of unions to strike and peacefully picket a primary employer, an employer with whom a union has a labor dispute. However, the Act also seeks to protect those employers that do business with primary employers, *i.e.*, secondary employers, and prevent them from being hauled into disputes between unions and primary employers. Section 8(b)(4) of the NLRA thus makes it an unfair labor practice for unions to engage in certain conduct, namely encouraging a secondary's employees to go on strike or threatening a secondary's customers, with the object of pressuring the secondary employer to cease doing business with their primary employer.<sup>9</sup>

In an advice memorandum dated December 20, 2018, however, the General Counsel's Office (GCO) instructed an NLRB Regional Director to issue a complaint against the International Brotherhood of Electrical Workers, Local 134 for erecting a twelve-foot inflatable at a secondary employer's place of business.<sup>10</sup> The GCO's memorandum calls on the Director to urge the Board to overturn three of its previous decisions issued during the Obama administration, which interpreted Section 8(b)(4) narrowly enough to render Scabby and its inflatable friends as lawful under the Act.<sup>11</sup> Multiple ALJs and at least one district judge have had the opportunity to accept the GCO's position on Scabby since the release of this memorandum,

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<sup>5</sup> These include Fat Cat, Greedy Pig, and Union Bug, among others.

<sup>6</sup> Sarah Jaffe & Molly Craba, *The History of Scabby the Rat*, VICE (Mar. 7, 2013), [https://www.vice.com/en\\_us/article/avnmgp/the-history-of-scabby-the-rat](https://www.vice.com/en_us/article/avnmgp/the-history-of-scabby-the-rat).

<sup>7</sup> See *id.*; see also discussion *infra*, Section III.

<sup>8</sup> See Gold, *supra* note 4.

<sup>9</sup> 29 U.S.C. § 158(b)(4) (2018).

<sup>10</sup> Advice Mem. from U.S. Gov't N.L.R.B. Office of the General Counsel, Case 13-CC-225655 (Dec. 20, 2018), available at <https://www.nlr.gov/case/13-CC-225655>. However, the memorandum was not released until May 2019.

<sup>11</sup> *Id.*

but consistent with NLRB precedent, they have rejected its contentions.<sup>12</sup> As a result, some of these cases are pending before a Board that—as of April 9, 2020—consists of three Republican-appointed members<sup>13</sup> who can either follow NLRB precedent or forge a new path without Scabby.

This Comment addresses whether the current legal battle surrounding secondary pressure, primarily led by Peter Robb, marks the beginning of the end for Scabby the Rat. Section I first tracks the history of Scabby and how unions have increasingly relied on the towering inflatable to exert pressure on secondary and primary employers. Section II then explores the general legal background of this issue, including the current interpretations of Section 8(b)(4) and Supreme Court jurisprudence regarding picketing and the First Amendment. Section III builds on that discussion and delves into how the NLRB and courts have applied Section 8(b)(4) to Scabby ever since it made its debut on the picket line.<sup>14</sup> In doing so, this Comment surveys the constitutional and statutory grounds on which Scabby has been able to fend off legal challenges for three decades.

Lastly, Section IV addresses the key arguments outlined in the GCO's memorandum: that unions' use of Scabby outside secondary employers' places of business categorically violates Section 8(b)(4) because it amounts to signal picketing and is unlawfully threatening and coercive. This Comment argues that the GCO's position wholly ignores the First Amendment and is contrary to decades of NLRB precedent. The most appropriate solution that adheres to the NLRA's statutory language and accounts for the interests of unions and secondary employers is a case-by-case determination that focuses on *how* the unions use inflatables, not whether they used them in the first place.

## I. SCABBY THE RAT: FROM GHASTLY RODENT TO UNION ROCKSTAR

Standing at up to thirty feet with a scabby belly, snarling buckteeth, and menacing claws, Scabby the Rat has become a cornerstone of the labor

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<sup>12</sup> See discussion *infra*, Section III.C.

<sup>13</sup> See *Board Members Since 1935*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are/board/board-members-1935> (last visited Apr. 9, 2020).

<sup>14</sup> In using the term “picket line,” this Comment does not suggest that a union's use of Scabby is always considered picketing, as that is a term of art that carries meaning under the NLRA. See discussion *infra*, Section II.D. Rather, this Comment uses the term “picket line” informally to refer to union demonstrations generally, whether such demonstrations constitute picketing or not.

community. Scabby was born in Chicago in 1990 when Ken Lambert and Don Newton, organizers from District Council 1 of the International Union of Bricklayers and Allied Craftworkers, sought a “bigger than life” symbol to use for its picket lines.<sup>15</sup> A company called Big Sky Balloons received the call, and after sketching multiple preliminary versions of the rodent, the Bricklayers were satisfied that it had the right amount of hideousness to serve its purpose.<sup>16</sup> Scabby was born.

“The novelty spread like rats.”<sup>17</sup> Less than a year after the Bricklayers presented Scabby to the world, unions across the country bought into the idea of posting these inflatables as a part of their protest strategies.<sup>18</sup> Today, Big Sky Balloons sells more than 100 inflatable rats a year, ranging anywhere from six to thirty feet tall.<sup>19</sup> Most purchasers come from the East Coast, but Scabby has found a home in places as far as California and even Canada.<sup>20</sup>

Why a rat? Different labor organizations have assigned varying meanings to Scabby, such as “a contractor that does not pay all of its employees prevailing wages”<sup>21</sup> or as a synonym for strike replacement workers, often referred to as “scabs.”<sup>22</sup> In the words of a New York union, the biggest rats are those who hog all the food and are willing to kill the other rats to keep the food for themselves.<sup>23</sup> The rat represents those employers that are cheap,

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<sup>15</sup>Jaffe & Craba, *supra* note 6. A dispute between Local 150 and the Bricklayers remains as to which union brought Scabby to life. The Bricklayers assert that they placed the first-ever orders for Scabby from Big Sky Balloons starting in 1990. Local 150 responds with a newsletter from 1989 reporting on their contest to name an inflated rat, which they fit atop a car called “Rat Patrol.” The 1989 rat, however, looks much different than the Scabby unions have come to love. Still, there is no debate that Scabby’s bloodline can be traced to Chicago’s unions. *See* David Roeder, *Scabby the Rat in jeopardy? Fuhgeddaboutit!*, CHICAGO SUN TIMES (Aug. 11, 2019), <https://chicago.suntimes.com/news/2019/8/11/20794184/scabby-the-rat-union-national-labor-relations-board>.

<sup>16</sup>Gold, *supra* note 4.

<sup>17</sup>Jaffe & Craba, *supra* note 6.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>United Bhd. of Carpenters & Joiners of Am., Local 156 & Eliason & Knuth of Ariz., Inc., 355 N.L.R.B. 797, 823 (2010).

<sup>22</sup>Occidental Chem. Corp. (John Masic Niagara Hooker Emps. Union), 294 N.L.R.B. 623, 636 n.24 (1989).

<sup>23</sup>New York Daily News, *Keepers of the Rat*, YOUTUBE (June 2, 2016), <https://www.youtube.com/watch?v=soJu0FSqJtE>.

exploit their workers, and want to complete projects as cheaply as possible.<sup>24</sup> Other inflatables like Fat Cat, Greedy Pig, and Union Bug further represent worker exploitation at the hands of money-grabbing employers.<sup>25</sup> Inflatables, whether used against primary or secondary employers, have proven to be an effective tool for publicizing disputes with employers and pressuring them during contract negotiations, campaigns for representation, and other disputes.<sup>26</sup>

## II. NLRA § 8(B)(4): SECONDARY PROTESTS

The National Labor Relations Act has governed labor relations between unions and employers whose operations affect interstate commerce ever since Congress passed the Act in 1935.<sup>27</sup> Unlike other federal and state laws that protect the rights of employees, the NLRA is specifically tied to the National Labor Relations Board, the administrative agency that oversees the administration of the NLRA. If within the Act's scope, the NLRA governs union organization and remedies for unfair labor practices when unions and their employers become involved in disputes. However, the NLRA also takes into account the fact that other employers not directly involved in labor disputes are often dragged into the mire and deserve protection.

The NLRA initially allowed unions to picket secondary employers with the intent of protesting their relationships with primary employers.<sup>28</sup> However, Congress subsequently passed Section 8(b)(4) as part of the 1959 Landrum-Griffin Act to prohibit certain picketing of secondary employers and keep them out of contentious labor disputes between unions and primary employers.<sup>29</sup> Relevant to this Comment are Sections 8(b)(4)(i)(B) and

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<sup>24</sup> *Id.*

<sup>25</sup> See Devin Gannon, *The Story behind 'Scabby the Rat' NYC's Symbol of Unionized Labor*, 6SQFT (July 12, 2017), <https://www.6sqft.com/scabby-the-rat-an-iconic-symbol-of-unionized-labor-in-nyc/>.

<sup>26</sup> Tzvi Mackson-Landberg, Note, *Is a Giant Inflatable Rat An Unlawful Secondary Picket Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act?*, 28 CARDOZO L. REV. 1519, 1524 (2006).

<sup>27</sup> See *The 1935 Passage of the Warner Act*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are/our-history/1935-passage-wagner-act> (last visited Jan. 12, 2020).

<sup>28</sup> See Joseph L. Guza, Comment, *A Cure for Laryngitis: A First Amendment Challenge to the NLRA's Ban on Secondary Picketing*, 59 BUFF. L. REV. 1267, 1276 (2011).

<sup>29</sup> See *id.*; see also Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, §§ 701-707, 73 Stat. 519.

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8(b)(4)(ii)(B), which prohibit some types of concerted activity when the union's objective is to exert secondary pressure.<sup>30</sup>

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<sup>30</sup>In its entirety, Section 8(b)(4) provides:

It shall be an unfair labor practice for a labor organization or its agents – (i) to engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is – (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by Section 8(e) of the Act; (B) 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 9; provided that nothing contained in clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work. Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act; Provided further, that for 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) (2018).

### A. Secondary Economic Pressure

Section 8(b)(4)(i)(B) makes it an unfair labor practice to “engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in, a strike or a refusal in the course of his employment to use . . . or otherwise handle or work on any goods, articles, . . . or to perform any services” where an object is “forcing or requiring any person to cease using, selling, or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person . . . .”<sup>31</sup> In other words, Section 8(b)(4)(i)(B) proscribes strikes, or encouraging a secondary’s employees to strike, or to engage in work stoppages when an objective is for the secondary employer to cease business with a primary employer.<sup>32</sup>

Additionally, Section 8(b)(4)(ii)(B) makes it an unfair labor practice to “threaten, coerce, or restrain a person engaged in commerce” where an object is “forcing or requiring any person to cease using, selling, or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person . . . .”<sup>33</sup> However, Section 8(b)(4)(ii)(B) does not proscribe all peaceful picketing at a secondary employer site. As described in further detail below, federal courts and the NLRB have distinguished between union conduct that is intimidating from that which is merely persuasive.<sup>34</sup> Much of the debate surrounding *Scabby* and other inflatables is whether their presence in protests directed at secondary employers is in itself threatening or coercive to the secondary’s employees or customers.

Section 8(b)(4) is as lengthy as it is convoluted. Still it can be simplified into a two-step analysis followed by a list of provisos that exempt certain activities from being considered unfair labor practices. For a labor organization to commit a Section 8(b)(4) violation, bad conduct (that proscribed in subsections (i) and (ii)) must be coupled with a bad purpose (those outlined in subsections (A) through (D)).<sup>35</sup> In other words, as long as a union carries out an action listed in either Section 8(b)(4)(i) or Section 8(b)(4)(ii) and an object of the union is proscribed by Sections 8(b)(4)(A)–

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<sup>31</sup> 29 U.S.C. § 158(b)(4)(i)(B) (2018).

<sup>32</sup> *See id.*

<sup>33</sup> 29 U.S.C. § 158(b)(4)(ii)(B) (2018).

<sup>34</sup> *See discussion infra*, Section III.A.

<sup>35</sup> *United Bhd. of Carpenters and Joiners of Am., Local 156 & Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. 797, 800 n.12 (2010).

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(D), then that amounts to a Section 8(b)(4) violation—unless an exception applies.

It is not necessary for the union to actually achieve its objective in order to meet the “bad purpose” prong of a Section 8(b)(4) violation.<sup>36</sup> Nor is it necessary that the proscribed objective be its only purpose, but rather it can be one of multiple purposes. As long as the surrounding circumstances show that one of the union’s objectives is proscribed by Sections 8(b)(4)(A)–(D), then that amounts to a bad purpose for purposes of an unfair labor practice.<sup>37</sup> In determining a union’s objective, the NLRB looks at multiple factors, such as written communications about the picket’s objective and events that immediately precede or follow the protests against the secondary employer.<sup>38</sup>

### *B. Get-Out-Of-Jail: Section 8(b)(4) ’s Provisos*

But Section 8(b)(4) presents a way out in some cases. It provides three provisos that exempt certain labor activities from being unfair labor practices when they would otherwise be Section 8(b)(4) violations. One of the provisos applies only to Section 8(b)(4)(B), in which the “bad purpose” is secondary pressure. The other two provisos generally apply to Section 8(b)(4) conduct. Although not the focus of this Comment, all three provisos are potentially applicable when unions use Scabby or other inflatables as a means of protesting outside a secondary employer’s place of business.

Specific to Section 8(b)(4)(B), wherein the union’s “purpose” is secondary pressure, is the proviso that exempts primary strikes and primary

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<sup>36</sup> And this is logical, as unions would be hard-pressed to concede an ill motive while protesting outside a place of business.

<sup>37</sup> See 29 U.S.C. § 158 (b)(4) (2018).

<sup>38</sup> See, e.g., Local 239, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. & Abbey Auto Parts Corp., 147 N.L.R.B. 8 (1964), *enforcement denied*, 340 F.2d 1020 (2d Cir. 1965); Int’l Bhd. of Elec. Workers, Local 265 and RP&M Elec., 236 N.L.R.B. 1333 (1978) (union’s demands for recognition preceding the picketing); Local 345, Retail Store Emps. Union, Retail Clerks Int’l Ass’n, AFL–CIO & Gem of Syracuse, Inc., 145 N.L.R.B. 1168, 1171–72 (1964) (what picketers say to passing employees, such as whether they ask employees to join the union); Am. Fed. of Gran Millers, Local Union No. 16, AFL–CIO & Bartlett & Co., Grain, 141 N.L.R.B. 974 (1963) (whether the union communicates with the employer or the NLRB that it intends to remove picketers if the employer recognizes the union); Waiters & Bartenders Local 500 et al. & Mission Valley Inn, 140 N.L.R.B. 433, 439 (1963) (whether the union demonstrates an intention to abandon an earlier picketing objective).



picketing from being an unfair labor practice.<sup>39</sup> Stated differently, if the protest is not actually directed at a secondary but rather a primary employer, then Section 8(b)(4)'s prohibitions do not apply.<sup>40</sup> Though beyond the scope of this Comment, the line between primary and secondary activity becomes blurred when, for example, the primary's premises are located inside of the secondary's place of business<sup>41</sup> or the secondary simply sells the primary's product but the latter does not have a physical presence there.<sup>42</sup>

The first general proviso relates to sympathy strikes, where a secondary employer's employees refuse to cross the picket line into the primary employer's premises.<sup>43</sup> The two caveats to this exception are: (1) the union's strike against the primary employer must be ratified or approved by an employee representative whom the employer is required to recognize; and (2) the secondary employer's employees may not cease work for their employer or refuse to enter their premises.<sup>44</sup> In other words, this proviso is not a loophole to engage in conduct that is proscribed in Section 8(b)(4)(i) of the Act.

The second general proviso, the publicity proviso, permits concerted activity at a secondary site when the purpose is to truthfully advise the public that the union has a labor dispute with the primary employer.<sup>45</sup> This proviso stems from the recognition that unions have First Amendment rights, and restricting them from publishing this information would unduly restrict these guarantees. However, conduct that constitutes picketing—a term that has been defined inconsistently by courts—or that has the effect of inducing a work stoppage by the secondary employees are explicitly excluded from this proviso.<sup>46</sup> Again, these caveats are meant to ensure that unions cannot hide behind these provisos as a way of engaging in conduct that is otherwise proscribed by Section 8(b)(4).

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<sup>39</sup> 29 U.S.C. § 158(b)(4)(B) (2018) (“ . . . [N]othing contained in this clause . . . shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.”).

<sup>40</sup> See discussion *infra* at Section II.A.

<sup>41</sup> See *Sailors' Union of the Pac. (Moore Dry Dock)*, 92 N.L.R.B. 547, 549 (1950) (setting standard for common situs picketing).

<sup>42</sup> See discussion *infra*, Section II.C.

<sup>43</sup> See 29 U.S.C. § 158(b)(4)(B) (2018).

<sup>44</sup> *Id.*

<sup>45</sup> See *id.*

<sup>46</sup> See generally *id.*

This Comment, however, is limited primarily to Section 8(b)(4)(ii)(B) and, to a lesser extent, Section 8(b)(4)(i)(B) because Scabby is typically present in union demonstrations directed at secondary employers to pressure them against doing business with the primary employer.

### C. Primary vs. Secondary Employer Dichotomy

One of the preliminary determinations that courts make when resolving Section 8(b)(4) complaints is whether the employer is a primary or secondary employer.<sup>47</sup> As already alluded to, a primary employer is one directly involved in a labor dispute with a union while a secondary employer is one that does business with the primary employer but has no direct dispute with the union.<sup>48</sup> The NLRA protects unions' and employees' rights, with certain limitations, to peacefully picket primary employers over labor disputes.<sup>49</sup> On the other hand, the NLRA does not protect to the same extent union activity aimed at secondary, *i.e.*, neutral, employers.<sup>50</sup>

But the line between primary and secondary picketing is not always so clear. In *Tree Fruits*, for example, the union at issue struck various apple producers that supplied Safeway supermarkets.<sup>51</sup> As part of its strategy, the union picketed outside of customer entrances at Safeway supermarkets in an attempt to dissuade Safeway's customers from purchasing the apples sold there.<sup>52</sup> This picketing was also intended to pressure Safeway into ceasing doing business with the primary employers, the apple producers.<sup>53</sup>

After examining the language and legislative history of Section 8(b)(4)(ii)(B), the Supreme Court concluded that Congress did *not* intend to ban all secondary picketing.<sup>54</sup> As it applied to the case at hand, the Court held that the union's picketing did not rise to the level of coercive activity

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<sup>47</sup> See *Int'l Union of Operating Eng'rs, Local 150 (Donegal Servs.)*, 13-CP-227526, 2019 WL 6838679 (N.L.R.B. Div. of Judges Dec. 13, 2019).

<sup>48</sup> *Id.*

<sup>49</sup> See 29 U.S.C. § 158(b)(4)(B) (2018).

<sup>50</sup> See *id.*

<sup>51</sup> *N.L.R.B. v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 59–60 (1964).

<sup>52</sup> *Id.* at 60–61.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 64–69.

prohibited by Section 8(b)(4).<sup>55</sup> Although the Court did not provide a clear framework for future cases, it distinguished between picketing that is focused on only one product and activity that creates a distinct dispute with the secondary employer.<sup>56</sup> The Court explained that the former, which was present in *Tree Fruits*, constitutes lawful *primary* activity while the latter, which was not present, amounts to unlawful coercive activity because it is aimed at a secondary employer.<sup>57</sup>

On the other hand, *Safeco* presented facts that fell under the latter category. There, the union had a primary dispute with an insurance company, but it picketed the title companies that received business from the insurance company.<sup>58</sup> Although the union picketed only one product—the primary employer’s insurance underwriting—the secondary title companies relied on the primary employer for ninety percent of their profits.<sup>59</sup> Because the Court concluded that the title companies’ reliance on the insurance company turned this into a secondary-picketing scenario, it held that the union had committed a Section 8(b)(4)(ii)(B) unfair labor practice.<sup>60</sup>

Further nuances, such as the ally doctrine,<sup>61</sup> make the primary-versus-secondary-employer dichotomy a more complex legal subject than appears at first glance. The foregoing cases involving the use of Scabby, however, do not hinge on whether the protest was directed at a primary or secondary employer. In those cases, there is no dispute that Scabby was flashing its teeth outside the premises of secondary, not primary, employers.<sup>62</sup>

#### D. Picketing [Un]defined

To understand the implications of the First Amendment on Scabby, it is helpful to first understand what the term “picketing” means. Although the

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<sup>55</sup> *Id.* at 63.

<sup>56</sup> *Id.* at 63–64.

<sup>57</sup> *Id.* at 72.

<sup>58</sup> *N.L.R.B. v. Retail Store Emp. Union, Local 1001 (Safeco)*, 447 U.S. 607, 609 (1980).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 615–16.

<sup>61</sup> *See N.L.R.B. v. Bus. Mach. & Office Appliance Mech. Conf. Bd., Local 459*, 228 F.2d 553, 558 (2d Cir. 1955) (providing that where an independent employer is doing work that it would not otherwise do but for a strike against the primary employer and it benefits from the strike, the independent employer is so allied with the primary employer that it cannot complain of secondary pressure on its premises).

<sup>62</sup> *See* discussion *infra*, Part 0.

definition of picketing merits its own article, this Comment at a minimum explores the basics of this term because Section 8(b)(4) prohibits certain form of picketing, namely signal picketing. Because the NLRA does not define the term, however, the NLRB and federal courts have enjoyed free rein to identify the features and indicia of activity that constitute picketing.<sup>63</sup> Despite some Supreme Court opinions addressing the issue, the absence of a statutory directive has made picketing an ill-defined concept that varies across time and jurisdiction. Unsurprisingly, a large part of the GCO's concerns with the decisions issued during the Obama administration relate to how the NLRB defined picketing, particularly in the context of Section 8(b)(4) complaints.<sup>64</sup>

Supreme Court precedent describes picketing as a “mixture of conduct and communication” with expressive elements.<sup>65</sup> Federal courts and the NLRB have explained that picketing, unlike non-coercive communications like handbilling, involves an element of confrontation or a symbolic barrier between the union and the employees or customers entering the employer's business.<sup>66</sup> Therefore, to constitute picketing, the union's members must at a minimum interact with or confront the employer's employees or customers—directly or indirectly—to advance the union's cause.<sup>67</sup>

Additionally, while posting individuals at the employer's place of business or worksite to advance the union's cause, with or without signs, is a typical feature of picketing, it is not the *sine qua non* of picketing.<sup>68</sup> Rather, it is the act of patrolling—or walking back and forth before the employer's entrance—that creates the confrontation necessary to constitute picketing.<sup>69</sup> Moreover, a large crowd gathered at the employer's premises, often referred to as massing, will likely constitute picketing even if the participants do not

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<sup>63</sup> Relevant to this Comment is picketing directed at secondary employers that does not otherwise constitute primary picketing or fall within a Section 8(b)(4) proviso.

<sup>64</sup> See Advice Mem. from U.S. Gov't N.L.R.B. Office of the General Counsel, Case 13-CC-225655 (Dec. 20, 2018), available at <https://www.nlr.gov/case/13-CC-225655>.

<sup>65</sup> *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 580 (1988).

<sup>66</sup> See *Chi. Typographical Union Local 16 (Alden Press, Inc.)*, 151 N.L.R.B. 1666, 1669 (1965); see also *Sheet Metal Workers' Local 15 v. N.L.R.B.*, 491 F.3d 429, 438 (D.C. Cir. 2007).

<sup>67</sup> *N.L.R.B. v. Furniture Workers*, 337 F.2d 936, 940 (2d Cir. 1964).

<sup>68</sup> *Lumber v. Sawmill Workers Local 2797*, 156 N.L.R.B. 388, 394 (1965).

<sup>69</sup> See *United Bhd. of Carpenters & Joiners of Am., Local 156 & Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. 797, 802–10 (2010).

carry signs or patrol the premises because of the confrontational element present when a large group of people gathers.<sup>70</sup>

In attempting to distinguish between picketing and non-picketing, the NLRB and courts have emphasized the union's conduct as instructive, if not determinative.<sup>71</sup> Consequently, courts have long held that passing out handbills and displaying banners, without more, does not constitute picketing because those strategies rely on the persuasive force of the ideas within those communications, rather than on confrontation.<sup>72</sup> And just because the union moves the banners on occasion does not necessarily transform bannering into picketing.<sup>73</sup>

### 1. Section 8(b)(4) Picketing

Although picketing is not categorically proscribed by Section 8(b)(4), the NLRB has interpreted Section 8(b)(4)(i) as a prohibition on a particular type of picketing, referred to as signal picketing. Signal picketing is defined as “activity short of picketing through which a union intentionally, if implicitly, directs members not to work at the targeted premises.”<sup>74</sup> Correspondingly, this picketing is typically directed at the secondary employer's employees to induce them to cease work. In accordance with the requirements of a Section 8(b)(4)(i)(B) violation, the alleged conduct must “reasonably be understood by the [secondary] employees as a signal” to stop work and an objective be to “compel the secondary employer to cease doing business with the primary employer.”<sup>75</sup>

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<sup>70</sup> See *Mine Workers of Am. (New Beckley Mining Corp.)*, 304 N.L.R.B. 71, 72 (1991).

<sup>71</sup> See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 580 (1988) (“[P]icketing is a mixture of conduct and communication and the conduct element often provides the most persuasive deterrent to third persons about to enter a business establishment.”) (internal citations and quotation marks omitted).

<sup>72</sup> *Id.* at 576–80; see also *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1211 (9th Cir. 2005).

<sup>73</sup> *Sw. Reg'l Council of Carpenters (Richie's Installations, Inc.)*, 355 N.L.R.B. 1445, 1445 (2010).

<sup>74</sup> *United Bhd. of Carpenters & Joiners of Am., Local 156 & Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. 797, 805 (2010).

<sup>75</sup> *L.A. Bldg. & Constr. Trades Council, AFL-CIO (Sierra South Dev., Inc.) & Indep. Constr. Contractors of Cal.*, 215 N.L.R.B. 288, 290 (1974); *Sw. Reg'l Council of Carpenters*, 356 N.L.R.B. 613, 615–16 (2011) (finding that banner displays using the words “labor dispute” was not a signal to employees to cease work).

Conversely, union activity that violates Section 8(b)(4)(ii) is not necessarily picketing, but the two are related. The Board has explained that picketing and patrolling involve the kind of threat, restraint, or coercion contemplated by the Act only if it creates “physical or, at least, a symbolic confrontation between the picketers and those entering the worksite.”<sup>76</sup> Even if it involves patrolling with signs, union conduct that is merely persuasive rather than threatening or coercive does not violate the Act.<sup>77</sup> As explained above, however, case law indicates that conduct must be confrontational or at a minimum create a symbolic barrier to constitute picketing, which seems to be the same standard.<sup>78</sup> However, the Board has made clear that picketing is not *per se* violative of Section 8(b)(4)(ii),<sup>79</sup> so in application, it has required more for conduct to be considered threatening or coercive.<sup>80</sup>

### *E. Avoiding the First Amendment*

Looming over Section 8(b)(4) complaints is the First Amendment’s guarantee of freedom of speech. The landmark case discussing the intersection between the First Amendment and Section 8(b)(4) is *DeBartolo II*, where the Supreme Court considered whether a union’s peaceful handbilling of businesses in a shopping mall constituted a Section 8(b)(4)(ii)(B) unfair labor practice.<sup>81</sup> The union’s primary dispute was with H.J. High Construction, which was hired by H.J. Wilson Company to construct a department store in the mall; however, neither the owner of the mall, DeBartolo, nor the mall’s tenants had a right to select the contractor.<sup>82</sup> Nonetheless, the union sought to pressure High and Wilson by distributing handbills to the mall’s customers and urging them to not shop at *any* store within the mall until DeBartolo publicly promised to only work with contractors who paid fair wages.<sup>83</sup>

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<sup>76</sup> *Eliason*, 355 N.L.R.B. at 802.

<sup>77</sup> *See id.* (“This element of confrontation has long been central to our conception of picketing for purposes of the Act’s prohibitions.”).

<sup>78</sup> *See* discussion *supra* Section II.D.

<sup>79</sup> *See Eliason*, 355 N.L.R.B. at 802.

<sup>80</sup> *See* discussion *infra* Section III.A.

<sup>81</sup> *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

<sup>82</sup> *Id.* at 570.

<sup>83</sup> *Id.* at 570–71. The handbills made clear that the union was seeking a consumer boycott only, not to induce secondary employees to cease working. *Id.* at 571. In addition, the union’s members

On the case's second trip to the Marble Palace,<sup>84</sup> the Court overturned the Board's finding that the union's conduct amounted to coercion in violation of Section 8(b)(4)(ii)(B).<sup>85</sup> In its analysis, the Court placed front-and-center the age-old canon of construction that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."<sup>86</sup> Here, the Court held that the Board's construction of Section 8(b)(4), as applied, raised serious First Amendment concerns.<sup>87</sup>

In reaching this conclusion, the Court harped on the peaceful nature of the handbilling, the truthful assertions made in the handbills, and the fact that the union had neither patrolled nor picketed the site.<sup>88</sup> The Court dismissed the idea that the First Amendment analysis should change or not apply simply because the facts concerned a union in a labor dispute.<sup>89</sup> However, it left the door open to the possibility that union communications could be considered commercial speech deserving of a "lesser degree of constitutional protection."<sup>90</sup>

Having determined that the Board's interpretation raised constitutional issues, the Court looked to Section 8(b)(4)'s legislative history to arrive at an alternative construction. Justice White emphasized that the proponents of the "threats, coercion, or restraints" provision were worried about "consumer boycotts of neutral employers carried out by picketing"—which is materially

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were posted at all four entrances of the mall, not just near the vicinity of Wilson's construction site. *Id.*

<sup>84</sup>The first time the case reached the Supreme Court, the issue was whether the complaint should have been dismissed because the handbilling was protected by the publicity proviso of Section 8(b)(4). *Id.* at 573. Concluding that the union's handbilling fell outside the scope of the publicity proviso, the Court remanded to the Board to determine whether the union's activity was proscribed by Section 8(b)(4) and, if so, whether it implicated the First Amendment. *Id.*

<sup>85</sup>*Id.* at 588.

<sup>86</sup>*Id.* at 575.

<sup>87</sup>Specifically, the Court reasoned that the Board's reading of Section 8(b)(4) "would make an unfair labor practice out of any kind of publicity or communication to the public urging a consumer boycott of employers . . ." *Id.* at 583.

<sup>88</sup>*Id.* at 575–76.

<sup>89</sup>*Id.* at 576.

<sup>90</sup>*Id.* However, the Court summarily explained that the union's handbills were not commercial speech because they spoke of concerns for inadequate wages, not advertising products. *Id.*

distinct from merely handbilling customers of secondary employers.<sup>91</sup> Additionally, the provision prohibiting secondary-consumer *picketing* was adopted with the “clarification that other forms of publicity [would] not [be] prohibited.”<sup>92</sup> By interpreting Section 8(b)(4) so as to not proscribe the handbilling that occurred outside the mall, a construction that neither the statutory language nor legislative history foreclosed, the Court need not have passed on the “serious constitutional questions that would [otherwise] be raised.”<sup>93</sup>

Relevant to the intersection between Scabby and the First Amendment is Justice Stevens’ concurrence in *Safeco*, where he expounded upon Section 8(b)(4)(ii)(B)’s constitutionality. There, Justice Stevens distinguished between speech and conduct under the First Amendment, explaining that the latter “often provides the most persuasive deterrent to third persons about to enter a business establishment.”<sup>94</sup> For that reason, he maintained that conduct, albeit expressive, receives less First Amendment protection.<sup>95</sup> Applying that to the case at bar, Justice Stevens reasoned that the union’s picketing “call[ed] for an automatic response to a signal, rather than a reasoned response to an idea.”<sup>96</sup> Therefore, the union, which also marched with signs as opposed to only handbilling, did not receive the free speech guarantees of the First Amendment.<sup>97</sup>

While there is no dispute that the First Amendment does not guarantee conduct proscribed by Sections 8(b)(4)(i) and 8(b)(4)(ii),<sup>98</sup> there is no clear answer as to whether the analysis calls for varying levels of scrutiny. In *Int’l Ass’n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers*, the 9<sup>th</sup> Circuit rejected a union’s argument that courts should apply strict scrutiny to

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<sup>91</sup> *Id.* at 584.

<sup>92</sup> *Id.* at 585–86 (quoting 105 CONG. REC. 18706, Leg. Hist. 1454 (Sen. Goldwater)).

<sup>93</sup> *Id.* at 588.

<sup>94</sup> *N.L.R.B. v. Retail Store Emp. Union, Local 1001 (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring).

<sup>95</sup> *Id.* (Stevens, J., concurring); *see also Cox v. Louisiana*, 379 U.S. 536, 555 (1965).

<sup>96</sup> *Safeco*, 447 U.S. at 619 (Stevens, J., concurring).

<sup>97</sup> *Id.* (Stevens, J., concurring).

<sup>98</sup> *See, e.g., Int’l Longshoremens’ Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212, 226 (1982) (“We have consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment.”).



the Section 8(b)(4)(i)(B) analysis.<sup>99</sup> There, the union conceded that it had engaged in unlawful signal picketing, which—even if done peacefully—is all the court needed to conclude that the “First Amendment [was] not at all implicated.”<sup>100</sup> As the foregoing analysis demonstrates, the GCO’s First Amendment arguments are based on the premise that outlawing Scabby carries no unconstitutional abridgment of speech, which ignores the crucial question in the analysis.<sup>101</sup>

### III. SCABBY’S JOURNEY THROUGH THE COURTS

This next Section tracks some of the principal cases, both from the NLRB and Article III courts, that have considered the lawfulness of Scabby as a union tool. This discussion must begin with the Board’s decision in *Eliason*, which predated Scabby, but it established the standard with which courts have analyzed inflatables under Section 8(b)(4). Although Robb and his team argue that Scabby violates both Section 8(b)(4)(i)(B) and Section 8(b)(4)(ii)(B), most of the Scabby decisions exclusively interpret the “threaten, coerce, or restrain” language in Section 8(b)(4)(ii)(B). This Section ends by considering some of the current cases that will likely end up before the Board and, potentially, circuit courts and the Supreme Court.

#### A. *Eliason*’s “Direct Disruption” Standard

In 2010, the Board extended the Supreme Court’s reasoning in *DeBartolo II* and found that stationary banners, much like the handbilling from *DeBartolo II*, were non-coercive speech that did not violate Section 8(b)(4)(ii)(B). In *Eliason*, the union placed banners, three to four feet high and fifteen to twenty feet long, on a public sidewalk outside the secondary employer’s premises approximately fifteen and 1,050 feet from the nearest entrance.<sup>102</sup> Union members stood beside both banners and handed out flyers to passersby.<sup>103</sup> In concluding that the union’s banners and conduct did not

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<sup>99</sup>N.L.R.B. v. Int’l Ass’n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, 941 F.3d 902, 905–06 (9th Cir. 2019).

<sup>100</sup>*Id.* at 905 (quoting *Warshawsky & Co. v. N.L.R.B.*, 182 F.3d 948, 952 (D.C. Cir. 1999)).

<sup>101</sup>See discussion *infra*, Section IV.0.

<sup>102</sup>United Bhd. of Carpenters and Joiners of Am., Local 156 and *Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. 797, 798 (2010). One banner read “SHAME ON [secondary employer]” and “Labor Dispute” while the other read “DON’T EAT ‘RA’ SUSHI.” *Id.*

<sup>103</sup>*Id.*

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amount to picketing, the Board pointed out that the union neither patrolled nor created any symbolic confrontation.<sup>104</sup> Unlike picketing signs, a stationary banner does not create the confrontation necessary to become picketing because people can simply “avert [their] eyes.”<sup>105</sup>

The *Eliason* Board thus established that the determinative question as to whether union activity at a secondary site is unlawful under Section 8(b)(4)(ii)(B) is whether it constitutes “intimidation or persuasion.”<sup>106</sup> Consistent with case law on picketing, it differentiated unlawful intimidation with protest activity that is merely persuasive which, “even when the object of the activity is to induce the secondary to cease doing business with a primary employer,” is lawful.<sup>107</sup>

However, the Board further concluded that the union’s conduct did not disrupt the secondary’s operations.<sup>108</sup> The Board cited to multiple cases in which non-picketing activity nonetheless constituted coercion because it disrupted the secondary’s operations, such as blocking entrances and broadcasting messages at “extremely high volume through loudspeakers.”<sup>109</sup> In this case, the members holding banners did not move, shout, or block the premise’s entrances.<sup>110</sup> The *Eliason* analysis can thus be summarized into three questions:

- (1) Whether the union activity violated the literal terms of § 8(b)(4)(ii)(B), *i.e.*, whether the union “threatened secondary employers or anyone else . . . through violence, intimidation, [or] blocking ingress and egress”;<sup>111</sup>
- (2) whether the union’s peaceful expressive activity at a purely secondary site constituted picketing; or

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<sup>104</sup> *Id.* at 802.

<sup>105</sup> *Id.* at 803 (citing *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1214 (9th Cir. 2005)).

<sup>106</sup> *Id.* at 800.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 805–06.

<sup>109</sup> *Id.*; *See also*, *Carpenters (Society Hill Towers Owners’ Ass’n.)*, 335 N.L.R.B. 814, 820–823 (2001), *enfd.* 50 Fed. Appx. 88 (3d Cir. 2002).

<sup>110</sup> *Eliason*, 355 N.L.R.B. at 806.

<sup>111</sup> *Id.* at 800.

(3) whether the union's non-picketing "conduct directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations."<sup>112</sup>

*B. Enter the Rat: Applying the Eliason Standard to Scabby*

Although the Board had an opportunity to pass on the lawfulness of Scabby in 2005,<sup>113</sup> its first decision concerning inflatables did not come until 2011, one year after *Eliason*. In *Brandon II*, a union placed a sixteen-foot tall Scabby in front of a hospital while one of its members distributed handbills publicizing a union dispute with a contractor and labor supply company.<sup>114</sup> The hospital hired the contractor and labor supply company, both which hired non-union employees, to perform HVAC installation on a new section of the building.<sup>115</sup> As a sign of protest, the union placed Scabby on public property not less than 100 feet away from the nearest hospital entrance; and the handbills proclaimed "[t]here's a 'rat' at Brandon Regional Hospital," referring to the labor supply company as the "rat employer."<sup>116</sup>

Following *Eliason*, the Board first found that neither Scabby nor any union member threatened, coerced, or restrained the hospital's employees or its visitors through violence or by blocking entrances.<sup>117</sup> Second, the Board

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<sup>112</sup> *Id.* at 805; *see also* Serv. Emps.' Local 525 (General Maintenance), 329 N.L.R.B. 638, 664–65, 680 (1990) (hurling filled trash bags into the building's lobby caused disruption); Serv. Emps.' Local 87 (Trinity Maintenance), 312 N.L.R.B. 715, 746–48 (1993) (using bullhorns directed at building's tenant caused disruption); Utd. Mine Workers of Am. And District 29 (New Beckley Mining Corp.), 304 N.L.R.B. 71, 71–72 (1991) (involving a mass early morning gathering of fifty to 140 people at motel housing agent providing striker replacements with shouting and name-calling caused disruption); Serv. Emps.' Local 399 (William J. Burns Agency), 136 N.L.R.B. 431, 436–37 (1962) (involving a mass gathering and marching without signs at exhibit hall entrance which impeded access and was categorically unlawful even if activity did not constitute picketing).

<sup>113</sup> Laborers' E. Region Org. Fund (The Ranches at Mt. Sinai), 346 N.L.R.B. 1251, 1251 (2006) (affirming ALJ's findings that the union unlawfully picketed in violation of Section 8(b)(4) and thus deeming it "unnecessary to pass on the judge's findings that the [union's] use of an inflated rat constitutes signal picketing").

<sup>114</sup> Sheet Metal Workers Int'l Ass'n (Brandon II), 356 N.L.R.B. 1290, 1290 (2011).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1291. The Board reiterated the principle from *Tree Fruits* that Section 8(b)(4)(ii)(B)'s legislative history did not evidence a congressional intent to prohibit stationary and peaceful displays. *Id.* However, The NLRB's then General Counsel, Lafe Solomon, argued—and the ALJ below agreed—that Scabby was "intimidating" and "coercive because it was the legal equivalent of

concluded that neither Scabby nor the handbills constituted picketing.<sup>118</sup> Comparing Scabby to the banners in *Eliason*, the Board reasoned that Scabby was not confrontational because it was stationary and located a sufficient distance from the hospital that it did not become a symbolic or physical barrier to visitors or employees.<sup>119</sup> Because the union's conduct was not confrontational, the Board held that it was not picketing.<sup>120</sup>

But this was not the end of the Board's analysis. Like in *Eliason*, the Board also found that the union's conduct did not cause disruption of the secondary employer's operations.<sup>121</sup> Pointing to the fact that the union agents were orderly and Scabby's "attendants" did not move, shout, or impede access to the hospital, the Board held that Scabby was purely symbolic speech.<sup>122</sup> The majority explained that Scabby's presence, while it drew attention to the union's dispute with the contractor and labor supply company, neither frightened the hospital's visitors nor disturbed operations in a manner comparable to the cases cited by the *Eliason* Board.<sup>123</sup>

Five years later, in *Westgate*, the Board extended its decision from *Brandon II* in holding that a union did not violate Section 8(b)(4)(ii)(B) by placing multiple banners<sup>124</sup> and a Scabby, Union Bug, Greedy Pig, and Fat Cat around the secondary's property.<sup>125</sup> Applying *Eliason*, the Board found that the union did not disrupt the secondary's operations and that its conduct

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picketing." *Id.* at 1293 n.3. The dissenting Board member took this argument to mean that signal picketing had occurred in violation of Section 8(b)(4)(i), but the majority rejected the idea that such argument had been alleged or argued by the General Counsel. *Id.* at 1293.

<sup>118</sup> *Id.* at 1292.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* According to the Board, the ALJ had relied almost exclusively on the union organizer's "admission" to the hospital official that the union was picketing. *Id.* However, the Board explained that the "'mere utterance of that word' in circumstances, as here, which show that the Union's conduct was bereft of any confrontational element, 'cannot transform' what is not picketing 'into picketing.'" *Id.* (quoting *Teamsters Local 688 (Levitz Furniture)*, 205 N.L.R.B. 1131, 1133 (1973)).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> The banners, four feet high and twenty feet long, read "LABOR DISPUTE: NIGRO DEVELOPMENT SUPPORTS IMMIGRANT LABOR BY HIRING A&B ENVIRONMENTAL AT THE WESTGATE."

<sup>125</sup> Laborers' Int'l Union, Local 872 (*Westgate Las Vegas Resort & Casino*), 363 N.L.R.B. No. 168 (Apr. 19, 2016).

was purely expressive non-picketing that did not amount to picketing.<sup>126</sup> Relying on its previous decisions, the Board reasoned that displaying banners and inflatables at a secondary employer's premises is not *per se* picketing.<sup>127</sup> Although the inflatables were stationed in multiple places on the secondary's property, the union ceased placing them after the secondary employer marked the area as private property.<sup>128</sup> Because the Board determined that no "bad conduct" had taken place in violation of Section 8(b)(4), it neither reached the "bad purpose" prong of the analysis nor discussed any potential First Amendment implications.<sup>129</sup>

Importantly, however, three key facts distinguish *Westgate* from *Brandon II*. The union in *Westgate* was on the secondary's private property, it posted multiple inflatables around the property, and some of its banners partially blocked a wheelchair access ramp.<sup>130</sup> Although the Board ultimately concluded that "whatever blockage occurred . . . was insignificant and de minimis," its decision suggests that the issue of disruption may be a question of degree.<sup>131</sup> That is, under the Board's current precedent, simply because inflatables are on the secondary's premises or partially block an access is not *per se* disruptive and in violation of Section 8(b)(4)(ii).<sup>132</sup>

### C. *Baiting the Mousetrap: ALJ Decisions Following the GCO Memorandum*

Scabby has hit some rough patches since the GCO issued its directive, but it lives to see another day . . . for now. After the release of 2018 GCO memorandum in May 2019, at least two ALJs and one federal district court have declined to accept the General Counsel's position that Scabby is unlawful under Section 8(b)(4)(i)(B) or Section 8(b)(4)(ii)(B).<sup>133</sup>

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *See id.*

<sup>130</sup> *Id.* However, the Board explained that this banner was on a "public traffic island eighty feet away from the front entrance walkway" and that an alternative route of equal distance was available. *Id.* The Board stated that no evidence was presented suggesting anyone was actually blocked or impaired because of the banner's location. *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *See id.*

<sup>133</sup> *E.g.* Int'l Bhd. of Elec. Workers, Local 98 (Fairfield Inn), JD-45-19, Case 04-CC-223346, 2019 WL 2296952 (N.L.R.B. Div. of Judges May 28, 2019); Int'l Union of Operating Eng'rs, Local

Importantly, all three decisions explain a crucial concept that can be easily mired amidst convoluted sets of facts: one illegal action does not make another legal action illegal.

First, in *Fairfield*, ALJ Giannasi held that the use of three Scabby's displaying no written messages near the entrance of a Fairfield Inn, the secondary employer, did not amount to threatening or coercive activity that violates Section 8(b)(4)(ii).<sup>134</sup> The ALJ was careful to describe with specificity the facts that supported his holding, among them that the inflatables were stationary, located on a public sidewalk, and the union members that passed out handbills were primarily stationed near the Scabby's.<sup>135</sup> Because this activity neither created a symbolic barrier nor blocked any entrances or the sidewalk, the ALJ concluded that the union's use of Scabby did not threaten, coerce, or restrain.<sup>136</sup> On the other hand, the union's use of an excessively loud bullhorn for over three hours directed at the Fairfield in the same location was disruptive, and thus unlawful, because the hotel's guests demanded room changes and compensation over the noise.<sup>137</sup> However, the ALJ distinguished between the conduct that he found unlawful and the use of Scabby, which he found to be lawful.<sup>138</sup>

In *Donegal*, however, ALJ Sorg-Graves faced the novel question of whether the use and display of inflatables with banners in proximity to ambulatory picketing<sup>139</sup> constituted an unfair labor practice under Section 8(b)(4).<sup>140</sup> The union picketed not only its employer, Donegal, but also followed Donegal's truck drivers and picketed the multiple customers and suppliers with which it did business.<sup>141</sup> Scabby found its way on many of these picket lines, holding up a sign reading, "SHAME ON [contractor's

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150, Afl-Cio & Donegal Servs., LLC & Ross Builders, Inc., JD-94-19, Case 13-CP227526, 2019 WL 6838679 (N.L.R.B. Div. of Judges Dec. 13, 2019).

<sup>134</sup> *Fairfield*, 2019 WL 2296952.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Ambulatory picketing, as opposed to stationary picketing, occurs when the union follows its primary employer's truck drivers and pickets them as they make deliveries or do business with other employers.

<sup>140</sup> JD-94-19, Case 13-CP227526, 2019 WL 6838679 (N.L.R.B. Div. of Judges Dec. 13, 2019).

<sup>141</sup> *Id.*

name] FOR HARBORING/USING RAT CONTRACTORS,” inserting the secondary employers’ names.<sup>142</sup>

In finding no Section 8(b)(4)(i)(B) violation, the ALJ cited to *Eliason*, where the Board reasoned that signal picketing “cannot include all activity conveying a ‘do not patronize’ message directed at the public simply because the message might reach, and send a signal to, unionized employees.”<sup>143</sup> In addition, the record was devoid of evidence that the secondary’s employees were present at the time that the union picketed or that it “timed the displays in coordination with the times that employees would report to work . . . .”<sup>144</sup>

As it related to Section 8(b)(4)(ii)(B), the ALJ’s holdings distinguished between instances when Scabby was and was not in the presence of union picketing. In other words, when Scabby and the union’s banners were stationary, and members did not initiate interactions with passersby, then such conduct was found to not be threatening, coercive, or restraining.<sup>145</sup> Conversely, where the union posted Scabby and banners simultaneously with “repeated ambulatory picketing,” such conduct was found to be coercive both as to the secondary’s customers and employees.<sup>146</sup> ALJ Sorg-Graves reasoned that the frequency of this conduct dragged the targeted secondary into the union’s dispute with Donegal.<sup>147</sup> However, just because unlawful picketing occurred in some locations did not convert the other stationary Scabby displays into coercive picketing.<sup>148</sup>

Lastly, in *King v. Local 79*, a Regional Director of the NLRB sought injunctive relief in district court against a union, alleging that its use of inflatable rats and cockroaches constituted an unfair labor practice under Sections 8(b)(4)(i)(B) and 8(b)(4)(ii)(B).<sup>149</sup> In that case, Local 79 set up the inflatables—with various signs attached to their “stomachs”—outside three ShopRite locations for doing business with a construction company

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* (citing to United Bhd. of Carpenters & Joiners of Am., Local 156 & Eliason & Knuth of Ariz., Inc., 355 N.L.R.B. 797, 805 (2010)).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *King v. Laborers’ Int’l Union, Local 79*, 393 F. Supp. 3d 181, 184 (E.D.N.Y. 2019).

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that used non-union labor.<sup>150</sup> Unlike the two abovementioned cases, which were decided on the merits, the legal standard in *King* was different because it arose in the context of a temporary restraining order and preliminary injunction.<sup>151</sup>

Nonetheless, Judge Garaufis denied the Director's motion for an injunction, holding there was no reasonable cause to believe that the use of Scabby amounted to signal picketing or was unlawfully coercive.<sup>152</sup> First, he looked closely at the evidence and did not find that Local 79's members encouraged ShopRite employees to stop working or that the latter ever refused to perform services.<sup>153</sup> Most importantly, the court was not convinced by the Director's conclusory arguments that using the inflatables constituted signal picketing, as the record did not contain any "evidence indicating that [Scabby] and [Union Bug] were a 'prearranged or generally understood signal' meant to induce or encourage" a work stoppage."<sup>154</sup>

Second, as it related to Section 8(b)(4)(ii)(B), the court found that Local 79's use of inflatables did not constitute picketing generally and lacked the essential element of coercion necessary to be a violation of the Act.<sup>155</sup> Basing these conclusions on the Supreme Court's guidelines from *DeBartolo II*, the court explained that Local 79's message was rooted in persuasion, not coercion.<sup>156</sup> Moreover, that a violation of Section 8(b)(4)(ii)(B) and an injunction of expressive conduct could be based on a disagreement with the content of the message, the court explained, "is untenable, and would raise serious constitutional concerns."<sup>157</sup>

Contrary to what the GCO memorandum advocates, none of the judges in these three cases dealt in absolutes or hypotheticals. Neither the two ALJs nor the district judge found Scabby to be unlawfully coercive just

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<sup>150</sup> *Id.* at 185–86.

<sup>151</sup> *Id.* at 196 ("[A] district court's task is two-fold: it must determine whether there is reasonable cause to believe that the NLRA has been violated, and if so, whether the requested relief is just and proper.") (quoting *Silverman v. 40-41 Realty Assocs., Inc.*, 668 F.2d 678, 680 (2d Cir. 1982) (internal quotations omitted)).

<sup>152</sup> *Id.* at 201, 202.

<sup>153</sup> *Id.* at 198.

<sup>154</sup> *Id.* at 199 (quoting *Sw. Reg'l Council of Carpenters*, 356 N.L.R.B. 613, 616 (2011)).

<sup>155</sup> *Id.* at 202.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*



because the Directors argued that Scabby looked mean and menacing. They also refused to conclude that the secondary's employees were encouraged to cease work if the record indicated that no employee actually stopped working. As discussed in further detail below, the three aforementioned decisions illustrate why the proper approach to this issue is a case-by-case analysis based on actual evidence rather than hypotheticals.

#### IV. LOOKING PAST SCABBY'S BEADY-RED EYES

"Threatening? Coercive? Let's remember, it's a balloon."<sup>158</sup> And taken literally, Scabby is just a balloon. But the answer to put the debate about Scabby and its inflatable friends to rest lies not in the deceptively simple notion that Scabby always or never amounts to bad conduct under Section 8(b)(4). Such extreme views ignore the infinite ways in which unions use inflatables, much like they use handbills and banners, to exert secondary pressure. The National Labor Relations Act could have sought to ban union activity directed at secondary employers altogether, but consistent with the First Amendment, Congress chose a different course. This final Section analyzes the General Counsel's push to exterminate Scabby and convince the Board overturn its precedent on inflatables. In doing so, this Section further discusses the future of Scabby and other inflatables as a lawful union tactic under Section 8(b)(4).

##### A. Section 8(b)(4)(i): Scabby as a Signal to Stop Working

In its memorandum, the GCO argues that Scabby is signal picketing because placing inflatables near the entrances of secondary premises seeks to dissuade the public through coercive conduct rather than persuasive messages.<sup>159</sup> Not only is this position as conclusory as some of the dissents' reasonings in *Eliason* and *Brandon II*,<sup>160</sup> but it also wholly misses the

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<sup>158</sup> David Roeder, *Scabby the Rat in jeopardy? Fuhgeddaboutit!*, CHICAGO SUN TIMES (Aug. 11, 2019), <https://chicago.suntimes.com/news/2019/8/11/20794184/scabby-the-rat-union-national-labor-relations-board>.

<sup>159</sup> Advice Mem. from U.S. Gov't N.L.R.B. Office of the General Counsel, Case 13-CC-225655 (Dec. 20, 2018), available at <https://www.nlr.gov/case/13-CC-225655>.

<sup>160</sup> See, e.g., *United Bhd. of Carpenters & Joiners of Am., Local 156 & Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. 797, 806 (2010) ("[T]he dissent further asserts that the banner 'sought to

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standard by which conduct is unlawful under Section 8(b)(4)(i). In fact, it conflates Section 8(b)(4)(i) with Section 8(b)(4)(ii) by suggesting that coercive conduct is necessarily tantamount to signal picketing, logic which would render the former provision superfluous under the NLRA.<sup>161</sup>

Ultimately, the GCO's argument concerning Section 8(b)(4)(i) attempts to broaden the definition of picketing generally, but this subsection of Section 8(b)(4) is concerned with a particular type of picketing. As described in more detail above,<sup>162</sup> signal picketing is conduct that falls short of traditional picketing, but the secondary's employees reasonably understand it as a message to stop working for their own employer. Therefore, the question of whether Scabby violates Section 8(b)(4)(i) necessarily requires a discussion into what message unions send through the use of inflatables. However, the GCO's memorandum does not explain why or how an inflatable sends the unmistakable, or even implicit, message to a secondary's employees to stop work.

That multiple meanings that have been ascribed to Scabby<sup>163</sup>—not to mention the various other meanings that other inflatables embody—weakens, if not precludes, the General Counsel's position that Scabby unmistakably sends one, universal message to secondary employees: strike your employer. This is fundamentally different from a situation in which the union hangs a sign on Scabby with a message reading, "STOP WORK NOW!" and aims it directly at the secondary employees' entrance. No union could sensibly argue that the use of Scabby under the latter scenario is not tantamount to signal picketing.

Additionally, as was the case in *Tree Fruits*, the union's activity may not be directed at the secondary's employees at all. In that case, the union purposefully waited to picket until after Safeway's employees entered the store to work, and the union members left before the employees clocked out.<sup>164</sup> The D.C. Circuit made the opposite finding in *Warshawsky*, where the union's handbilling was "*de facto* directed only at the neutral employees" because it occurred on an access road only at times when the secondary's

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invoke...fear or retaliation if the picket is defied,' but can point to no evidence whatsoever suggesting such intent or effect.") (internal quotations omitted).

<sup>161</sup> Superfluous at least as it relates to conduct directed at the secondary's employees because Section 8(b)(4)(i) considers only employees, not customers or the general public.

<sup>162</sup> See discussion *supra*, Section II.D.0.

<sup>163</sup> See discussion *supra*, Section 0.

<sup>164</sup> *N.L.R.B. v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. 58, 61 n.3 (1964).

employees reported for work.<sup>165</sup> Similarly, unions could wait until the secondary's employees are already at work before erecting Scabby or any other inflatable. If the secondary's employees cannot see Scabby before they clock in or out of work, they cannot be induced or encouraged to go on strike against their own employer.<sup>166</sup>

*B. Section 8(b)(4)(ii): It's Not About Whether You Scabby, But How You Scabby*

The GCO's conclusory line of reasoning spreads to its arguments about why Scabby is independently unlawful under Section 8(b)(4)(i) as unlawfully coercive, threatening, or restraining. The memorandum equates the "intimidating, violent cat strangling a construction worker," *i.e.*, Fat Cat, to conduct that the Board has found to be disruptive, such as broadcasting through loudspeakers or throwing filled trash bags into the secondary's lobby.<sup>167</sup> But it does not attempt to point out the similarities with those cases such that it removes inflatables from the confines of mere persuasion and "overstep[s] the bounds of propriety . . . ."<sup>168</sup>

Again, the memorandum conflates a union's protest materials with the way that it uses them. A filled trash bag sitting outside a secondary's premises is not itself coercive. A loudspeaker sitting on the ground is not itself coercive. Throwing a filled trash bag into a secondary's lobby *is* coercive.<sup>169</sup> Using a loudspeaker to broadcast a union's message to the people inside a secondary's building *is* coercive.<sup>170</sup> The GCO's logic works only if the Board accepts at face value that Scabby is itself coercive or threatening no matter how a union uses it.

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<sup>165</sup> *Warsawsky & Co. v. N.L.R.B.* 182 F.3d 948, 954 (D.C. Cir. 1999).

<sup>166</sup> *Cf. id.* at 953 (finding that peaceful union handbilling directed at *secondary employees* with the effect of causing them to refrain from working is itself unlawful under Section 8(b)(4)(i)) (emphasis added).

<sup>167</sup> Advice Mem. from U.S. Gov't N.L.R.B. Office of the General Counsel, Case 13-CC-225655 (Dec. 20, 2018), available at <https://www.nlr.gov/case/13-CC-225655>.

<sup>168</sup> *Id.* (quoting *Serv. & Maint. Emps., Local 399 (William J. Burns Detective Agency)*, 136 N.L.R.B. 431, 436–37 (1962)).

<sup>169</sup> *Serv. Emps. Int'l Union, Local 525 (Gen. Maint. Co.)*, 329 N.L.R.B. 638, 664–65, 680 (1999).

<sup>170</sup> *In re Metro. Reg'l Council of Phil. & Vicinity (Soc'y Hill Towers Owners' Ass'n)*, 335 N.L.R.B. 814, 820–23 (2001).

However, unions' different uses of inflatables are infinitely more nuanced than can be encompassed by such a simple resolution that does not fairly consider a union's conduct. Even the dissents in *Eliason* and *Brandon II* harp on the importance of "conduct" being the determinative factor in deciding whether a union has engaged in "bad conduct" under Section 8(b)(4).<sup>171</sup> Conduct is not whether Scabby is present or not. Conduct is *how* the union presents Scabby.

Additionally, the emphasis on conduct permeates throughout Section 8(b)(4) caselaw. There is a stark difference between, for example, peacefully handing out handbills to passersby, who could choose to take the bill or not, and forcefully shoving the handbills in their chests.<sup>172</sup> Again, the difference lies not in the handbills themselves, but rather how they are distributed. Similarly, Scabby on a public sidewalk across the street from the secondary's premises is different than if it stands adjacent to the secondary's premises. There is a stronger argument that the latter scenario creates a symbolic barrier, especially if the union lines up the inflatables in such a way that neutral employees and the public must pass through them and cannot simply "avert [their] eyes."<sup>173</sup>

On the other hand, it would be dishonest to ignore the misleading, and thus potentially disruptive, messages that these inflatables can send to the public. For example, if a union posts a Union Bug—which is in essence an inflatable cockroach—outside a restaurant, it unmistakably (even if inadvertently) sends a message about the restaurant's services. It may dissuade people from eating at that restaurant and disrupt operations. To further prove the point outside the context of inflatables, a mock funeral—which unions have staged outside secondary employer hospitals<sup>174</sup>—can undoubtedly send a message about the hospital's services. And given the

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<sup>171</sup> See, e.g., *United Bhd. of Carpenters & Joiners of Am., Local 156 & Eliason & Knuth of Ariz., Inc.*, 355 N.L.R.B. 797, 821 (2010) (Schaumber and Hayes, dissenting) ("[T]he confrontational conduct element in secondary bannerling predominates over the speech element . . .").

<sup>172</sup> See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 583–84 (1988).

<sup>173</sup> *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1214 (9th Cir. 2005). This fact could have potentially merited a different finding in *Westgate*, where some of the inflatables arguably blocked wheelchair entrances.

<sup>174</sup> *Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15, AFL-CIO*, 418 F.3d 1259, 1261 (11th Cir. 2005) (finding that for purposes of temporary injunctive relief, there was reasonable cause that union's mock funeral amounted to secondary picketing).

highly personal reasons for which people visit hospitals, that type of activity can be disruptive to a hospital's operations. Therefore, although a union's use of inflatables may not be threatening or coercive as those words are commonly understood, it should still be "disruptive" as interpreted by the *Eliason* Board and thus violate Section 8(b)(4)(ii). However, whether union conduct can be disruptive and thus violate Section 8(b)(4)(ii) only because it misleads the public remains to be answered.

The district court in *King* addressed the argument that Local 79's use of inflatables sent ambiguous or potentially misleading messages to the public.<sup>175</sup> As already mentioned, the court readily dismissed that argument and explained that basing an injunction on that ground would raise serious constitutional concerns.<sup>176</sup> However, federal district courts are not bound by NLRB precedent,<sup>177</sup> which may explain why the *King* court did not consider *Eliason*'s direct disruption standard in the first place. Rather, the court relied primarily on the Supreme Court's decision in *DeBartolo II*.<sup>178</sup>

Nonetheless, even under the *Eliason* standard, union activity would not violate Section 8(b)(4)(ii)(B) if all it does is send misleading messages but does not disrupt the secondary's operations. In *King*, any "loss of [the secondary's revenue]—no evidence of which [was] in the record—[] [was] therefore 'not because [customers] [were] intimidated by a line of picketers,' but instead [was] 'the result of mere persuasion.'"<sup>179</sup> In other words, the Director failed to provide evidence linking the union's conduct with any potential disruption, even if purely economic, that ShopRite may have suffered.<sup>180</sup> Assuming that *Eliason*'s direct disruption was binding in federal and administrative courts alike, should the outcome be different if a union's misleading messages, if not otherwise picketing, economically disrupted the secondary's operations?

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<sup>175</sup> 393 F. Supp. 3d 181, 202 (E.D.N.Y. 2019).

<sup>176</sup> *Id.*

<sup>177</sup> *Cf.* Int'l Union of Operating Eng'rs, Local 150 (Donegal Servs.), 13-CP-227526, 2019 WL 6838679 (N.L.R.B. Div. of Judges Dec. 13, 2019) ("I am bound to apply Board and not circuit court precedent.").

<sup>178</sup> *King*, 393 F. Supp. 3d at 202.

<sup>179</sup> *Id.* (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 580 (1988)).

<sup>180</sup> *See id.*

Because of the First Amendment, the answer will likely depend on whether the union is exclusively engaging in speech or also conduct.<sup>181</sup> If the union's conduct is considered purely speech under First Amendment jurisprudence, then no matter how misleading the message may be, there is likely no recourse for secondary employers.<sup>182</sup> Conversely, because picketing is a mixture of conduct and communication, activity that falls just shy of picketing may still involve an element of "conduct" and fall outside the core protections of the First Amendment.<sup>183</sup>

### C. *The End of Scabby the Rat?*

*Fairfield Inn* and *Donegal* are headed to a Board that—as of April 9, 2020—consists of three members, all Republican-appointed.<sup>184</sup> Whether the makeup of the Board remains that way once it decides those two cases is yet to be determined, although the Board does not customarily overrule existing precedent with less than four active members.<sup>185</sup> Nonetheless, Scabby's future is currently on the line before a pro-employer Board that will likely opt for exterminating the inflatable. There are primarily two paths the Board may take to reach its decisions, both of which will likely pose larger questions on union actions and free speech.

First, the board may try to wade into the murky and often unpredictable waters of redefining "picketing." After all, the Board certainly has authority to lean on for a broad definition of picketing, such as from when ALJs in the 2000s consistently concluded that certain bannerings constituted unlawful

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<sup>181</sup> See *N.L.R.B. v. Retail Store Emp. Union, Local 1001*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring) ("Because I believe that such restrictions on *conduct* are sufficiently justified by the purpose to avoid embroiling neutrals in a third party's labor dispute. I agree that the statute is consistent with the First Amendment.") (emphasis added).

<sup>182</sup> See *id.* (Stevens, J., concurring).

<sup>183</sup> See *id.* (Stevens, J., concurring).

<sup>184</sup> Robert Iafolla, *Short-Handed NLRB Confirms Power to Decide Cases After Recusals*, BLOOMBERG LAW (Jan. 10, 2020), <https://news.bloomberglaw.com/daily-labor-report/short-handed-nlr-confirmed-power-to-decide-cases-after-recusals>; see also *Board Members Since 1935*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are/board/board-members-1935> (last visited Apr. 9, 2020).

<sup>185</sup> Chip Zuver, *NLRB is likely to operate with just four members for the time being*, FOX ROTHSCHILD LLP (July 31, 2018), <https://laborlaw.foxrothschild.com/2018/07/articles/general-labor-law-news-updates/national-labor-relations-board-nlr/nlr-is-likely-to-operate-with-just-four-members-for-the-time-being/>.

picketing.<sup>186</sup> As the analysis above demonstrates, whether a union has engaged in secondary picketing or not is invariably a crucial determination because it shifts the entire Section 8(b)(4) analysis and carries different constitutional concerns. There is little question that courts and the NLRB have defined picketing more or less narrowly over time, and the GCO is unsurprisingly pointing to those cases that support its position.<sup>187</sup> Without a single, bright-line test for whether conduct is picketing, the Board has latitude to frame the facts from *Donegal* and *Fairfield* and match them with the caselaw defining picketing broadly.

Second, the Board could also revisit, and potentially even leave behind, the “direct disruption” standard established in *Eliason*, which posits a seemingly higher standard for conduct to be deemed threatening or coercive.<sup>188</sup> Although the GCO’s memorandum did not go as far as to argue that the *Eliason* standard is unsupported by Section 8(b)(4) language or case law, it did attempt to equate Scabby with other union conduct that was found to run afoul of that standard.<sup>189</sup>

If the GCO convinces the Board to overturn its precedent on Scabby, whether or not it holds that Scabby is *per se* unlawful, it may raise the circuit courts’ and Supreme Court’s eyebrows. And it should, especially if the Board is swayed by the GCO’s argument that union conduct “is entitled to lesser First Amendment protection because it is labor and/or commercial speech.”<sup>190</sup> Many of the GCO’s other arguments leave room for debate, but this one is plainly incorrect. The Supreme Court made clear long ago that communications are not somehow less deserving of First Amendment protections simply because they arise in the context of a labor dispute.<sup>191</sup> Speech does not become commercial unless it promotes some type of

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<sup>186</sup>Michael J. Hayes, *It’s Now Persuasion, Not Coercion: Why Current Law on Labor Protest Violates Twenty-First Century First Amendment Law*, 47 HOFSTRA L. REV. 563, 614 n.399 (2018).

<sup>187</sup>Advice Mem. from U.S. Gov’t N.L.R.B. Office of the General Counsel, Case 13-CC-225655 (Dec. 20, 2018), available at <https://www.nlr.gov/case/13-CC-225655>.

<sup>188</sup>See Sheet Metal Workers Int’l Ass’n (Brandon II), 356 N.L.R.B. 1290, 1291 (2011) (Schaumber and Hayes, dissenting).

<sup>189</sup>Advice Mem. from U.S. Gov’t N.L.R.B. Office of the General Counsel, Case 13-CC-225655 (Dec. 20, 2018), available at <https://www.nlr.gov/case/13-CC-225655>.

<sup>190</sup>*Id.*

<sup>191</sup>Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 576 (1988).

commerce, such as advertising products.<sup>192</sup> No matter the path the Board eventually takes, it will not likely dismiss the First Amendment implications as nonchalantly as the GCO.

In addition, the GCO memorandum conflates two distinct issues: whether the use of Scabby violates Section 8(b)(4) and whether conduct that is proscribed by Section 8(b)(4) implicates the First Amendment.<sup>193</sup> It is well settled that the First Amendment is not implicated when a union's conduct violates the NLRA.<sup>194</sup> To frame the dispute around that question, however, is a red herring because the real issue is whether the use of Scabby violates Section 8(b)(4) in the first instance.

This Comment cannot advance one universal answer that would resolve each and every Section 8(b)(4) complaint based on a union's use of Scabby because the appropriate approach is a case-by-case determination. The ALJ decisions in *Fairfield* and *Donegal* and the district court's decision in *King* illustrate the proper way that the Board should analyze Scabby. In those cases, the judges looked closely at the facts and applied the relevant case law but did not deal in hypotheticals. In other words, they scrutinized the record for evidence that neutral employees or customers actually felt dissuaded to enter the secondary's premises or did not show up to work because of the union's presence.<sup>195</sup> While actual disruption would unquestionably violate Sections 8(b)(4)(i) and 8(b)(4)(ii), this type of witness testimony provides a clearer picture of whether the evil that Congress sought to eliminate is at play.<sup>196</sup> Simply stated, the Board should not deal in absolutes. These cases involving inflatables are admittedly difficult to administer because of inconsistent case law and the absence of definitions to key terms in the NLRA. The approach proposed here, however, is not novel, and consistent

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<sup>192</sup> See *id.*; see also *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980).

<sup>193</sup> See Advice Mem. from U.S. Gov't N.L.R.B. Office of the General Counsel, Case 13-CC-225655 (Dec. 20, 2018), available at <https://www.nlr.gov/case/13-CC-225655> ([T]he Supreme Court has recognized that the First Amendment does not shield conduct that falls afoul of [Section 8(b)(4)'s] prohibition[s]).

<sup>194</sup> See, e.g., *N.L.R.B. v. Retail Store Emp. Union, Local 1001*, 447 U.S. 607, 616 (1980) (“[Section] 8(b)(4)(ii)(B) imposes no impermissible restrictions upon constitutional protected speech.”).

<sup>195</sup> See, e.g., *Int'l Union of Operating Eng'rs, Local 150 (Donegal Servs.)*, JD-94-19, Case 13-CP227526, 2019 WL 6838679 (N.L.R.B. Div. of Judges Dec. 13, 2019).

<sup>196</sup> See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 584 (1988).



with caselaw analyzing Section 8(b)(4) complaints in other contexts, it requires the same case-by-case determination into whether union activity constitutes either “intimidation or persuasion.”<sup>197</sup>

#### CONCLUSION

Labor laws are designed in theory, if not in practice, to balance the interests of employees and their employers. The National Labor Relations Act is no exception. But Section 8(b)(4) adds a third party to this employer-employee equation. The provisions related to secondary pressure arguably touch upon some of the most delicate concerns in the NLRA because they involve neutral employers without a connection to the employer-employee labor dispute. For this reason, Section 8(b)(4) proscribes the *manner* in which unions engage in secondary protests, not necessarily the physical materials they use to further their objectives. To determine whether the ghastly rodent that has become a union favorite is proscribed under Section 8(b)(4), the NLRB and courts should look past Scabby’s beady-red eyes and focus instead on the ways that unions use these inflatables to exert secondary pressure.

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<sup>197</sup>United Bhd. of Carpenters & Joiners of Am., Local 156 & Eliason & Knuth of Ariz., Inc., 355 N.L.R.B. 797, 800 (2010).