

Laborers' Eastern Region Organizing Fund and The Ranches at Mt. Sinai

Laborers' Eastern Region Organizing Fund and Concrete Structures, Inc. Cases 29–CC–1422 and 29–CP–662

April 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On June 14, 2005, Administrative Law Judge Steven Davis issued the attached decision. Laborers' Eastern Region Organizing Fund (Respondent) filed exceptions, a supporting brief, and an answering brief to General Counsel's limited exceptions. The Ranches at Mt. Sinai (The Ranches) filed exceptions, and Concrete Structures, Inc. (CSI) filed limited exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision and a limited exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, except as modified herein, and to adopt the recommended Order. For the reasons set forth below, we find it unnecessary to pass on the judge's finding that the Respondent's use of an inflated rat constitutes signal picketing. Instead, we base our conclusions solely on other evidence of unlawful picketing activity.

I. FACTS

As more fully set forth in the judge's decision, CSI pours concrete for building foundations and curbs, employing approximately 30 workers. The Respondent does not deny that throughout 2002 it made monthly demands for recognition to CSI's president, Americo Magalhaes, who refused the Respondent's demands.

In July 2002,² the Respondent engaged in conduct directed against CSI for about 2 weeks while CSI was engaged in a project at the Mills Pond Elementary School in Smithtown, New York. Although the Respondent's agents attempted to put a 15-foot tall inflated rat at the entrance of the school, the police required that the rat be set up immediately across the street from the school. A

sign was attached to the rat reading "Concrete Structures." The Respondent's agents were described as "walking back and forth" across the entrance and as pacing back and forth near the rat. The record does not indicate the exact duration of this conduct. In addition, the Respondent's agents were also seen talking to pedestrians, parents, and others and distributing Laborer's Local 66/Eastern Region handbills (as reproduced in the judge's decision) warning that CSI performed shoddy work at the school.

The Respondent repeated this activity against CSI in September at a construction site at Harborview Townhouses in Roslyn, New York. The Respondent's agents unsuccessfully attempted to place a 30-foot tall rat with a "Concrete Structures" label at the turnoff to the entrance, but before they could install it, the police made them move it to a location 15–20 feet away, in the median just across from the entrance. At the Harborview site, the Respondent at first had two or three agents positioned in front of the gates, walking back and forth and distributing handbills to CSI employees and others working on the site, as well as to pedestrians and homeowners. The handbills alleged shoddy work by CSI and identified the Respondent as the author. Apparently, the Respondent's agents later relocated a short distance away. The record does not detail how long they patrolled at the entrance.

In March, CSI began performing work for The Ranches, where 186 homes were being constructed on a 33-acre site in Mt. Sinai, New York. On October 28, the Respondent inflated a 30-foot tall rat at the main entrance, on which it attached a sign reading "Concrete Structures." The credited testimony indicates that three of the Respondent's agents positioned themselves at the entrance gates, walking back and forth across the entrance, doing so whether or not cars were immediately approaching the entrance. The Respondent's agents arrived at the entrance daily³ at about 7:30 a.m., when CSI and other contractors reported for work. The sales office did not open until 10 a.m. The Respondent's agents remained at the entrance each day for about 8 hours, walking back and forth in front of the rat and distributing handbills to passing cars, which read:

³ The Respondent admits that this conduct continued to November 6 and resumed on November 13 to 15.

¹ To the extent that the Respondent excepted to the judge's credibility findings, we have carefully examined the record and find no basis for reversing the judge's conclusions. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

² All dates are 2002, unless otherwise noted.

The Ranches at Mount Sinai

BUYER BEWARE

The “old charm” of Long Lake Development⁴ is not all it’s *cracked* up to be!

Long Lake Development has hired Concrete Structures for concrete work on this project.

Concrete Structures has a history of poor work, such as cracking in the concrete of the Mill Pond E.S. in Smithtown after just two weeks.

If you are considering buy [sic] a house at this location call Americo Magalhaes @ (631)588-7612

Ask him for a guarantee that the concrete will not crack or crumble after two months.

Justice in Concrete

(631) 733-0756

This is directed to the public. We are not asking anyone to cease work or stop deliveries.

Labor Donated

Joseph Dauman, an employee of another contractor working at the Mt. Sinai site, testified that when he appeared for work at the jobsite the Respondent’s agents “formed” at the entrance, apparently temporarily blocking his ingress. They then separated and allowed him to drive through. Dauman testified that the Respondent’s agents specifically made note of his license plate and immediately placed a telephone call after he drove past.

On October 30, the Respondent’s regional coordinator, Byron Silva, sent a letter to The Ranches’ management alleging that CSI had committed violations of The Occupational Safety and Health Act (OSHA) and New York State prevailing wage laws. Silva’s letter stated that “[i]t is our contention that Concrete Structures is not the most reputable contractor for your project. . . . We ask that this project be awarded to a contractor that is responsible.” The letter stated that the Respondent had launched and would continue a very public campaign against CSI, a clear reference to the Respondent’s conduct at the entrance to the Mt. Sinai jobsite.

On November 6, CSI President Magalhaes met with Silva and another union representative. Silva told Magalhaes that they wanted him to sign a union contract. Magalhaes refused, but told them that he also did work at the residential rate. Silva said that if he would pay the residential rate and call them within the week, they would remove the inflated rat. Following the meeting, the Respondent removed the rat, but then replaced it on

about November 13, after Magalhaes had not called during the prior week.

On November 13, The Ranches informed Magalhaes that the contract with CSI was being terminated because the picketers had not been removed. CSI left the jobsite that day. Two days later, the remaining concrete pouring work was awarded to another contractor whose employees were represented by a union. After The Ranches sent a letter to the Respondent confirming that this was done, the inflated rat and the handbillers were removed.

II. JUDGE’S ANALYSIS

The judge found that the Respondent’s conduct at the jobsites amounted to picketing. In this context, he found that the Respondent’s demand that The Ranches use a “responsible” contractor was the equivalent of asking The Ranches to sever its relationship with CSI. The judge concluded that the Respondent violated Section 8(b)(4)(i) and (ii)(B) at The Ranches by engaging in this conduct. The judge also concluded that because the Respondent’s picketing at The Ranches as well as at two other jobsites was for a recognitional object and exceeded 28 days over a 4-month period, during which time the Respondent did not file a petition for an election, the Respondent’s actions were unreasonable within the meaning of Section 8(b)(7)(C).

III. DISCUSSION

1. Section 8(b)(4)(i)(B) prohibits the inducement and encouragement of any individual to cease working where an objective, *inter alia*, is forcing any other employer to recognize or bargain with a labor organization that is not the certified representative of its employees. Section 8(b)(4)(ii)(B) prohibits the coercion of a neutral employer in furtherance of such an objective.

It is clear that the Respondent’s activity had a secondary objective. That is, the Respondent’s activity was aimed at a neutral, The Ranches, in pursuit of a recognitional dispute with primary CSI. The Respondent’s agent, Silva, repeatedly told Magalhaes that he wanted CSI to sign a union contract and, as indicated, the Respondent does not dispute this finding. Further, the Respondent’s October 30 letter to The Ranches, in which it demanded that The Ranches replace CSI with a “responsible” contractor, indicates that it wanted to pressure The Ranches to cease doing business with CSI with an objective of forcing CSI to recognize the Respondent.

Having determined that the Respondent’s object was secondary, the next question is whether the Respondent’s activity amounted to picketing and, therefore, was 8(b)(4) conduct in furtherance of this recognitional objective. We find that it was.

⁴ Long Lake Development was a contractor in a prior construction project, and was not working on The Ranches site in Mt. Sinai. Additionally, another similar handbill was distributed which omitted “The Ranches at Mount Sinai,” and which listed a contact name other than Magalhaes.

Picketing may be found to occur where a small number of persons actively engage in patrolling—back and forth movement—establishing a form of barrier at the site in question. *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 346 NLRB 199 (2006).⁵

Here, only two or three of the Respondent's agents were identified as being present onsite and they carried no traditional picket signs at any of these locations. Nonetheless, under the precedent cited, no minimum number of persons is necessary to create a picket line. The issue is not how many persons participated, but rather the activities in which they were engaged. Here, the Respondent's agents patrolled the area in front of the jobsite entrances, and in so doing, they marked their territory, creating a barrier. In finding the conduct by the Respondent to constitute "patrolling," we stress that the testimony regarding each of the three worksites in this case specifically indicated that the Respondent's agents walked back and forth across the sites' entrances. The Respondent has not attempted to dispute this description, or to contend that it occurred only when a handbiller was approaching an intended recipient of a handbill. In the absence of any evidence that the movement by the Respondent's agents could reasonably be described as something other than what it appeared to be, i.e., patrolling, we find that the Respondent's agents' back and forth movements at each of these locations effectively formed a barrier at the entrance to the sites that could be viewed as a form of picketing.

⁵ While the picketing in this case involved patrolling, the Board has held that "neither patrolling alone nor patrolling combined with the carrying of placards are essential elements to a finding of picketing; rather the 'important' or essential feature of picketing is the posting of individuals at entrances to a place of work." *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 743 (1993), enf. mem. 103 F.3d 139 (9th Cir. 1996), citing *Laborers Local 389 (Calcon Construction Co.)*, 287 NLRB 570, 573 (1987); *Teamsters Local 282 (General Contractors Assn. of New York)*, 262 NLRB 528, 529 (1982), *Carpenters Local 2797 (Stoltze Land & Lumber Co.)*, 156 NLRB 388 (1965); see also *Mine Workers District 2 (Jeddo Coal Co.)*, 334 NLRB 677, 686 (2001). The Board has also held that other conduct, apart from patrolling with placards, can be activity that constitutes picketing or at least "restraint or coercion" within the meaning of Sec. 8(b)(4)(ii)(B). See, e.g., *Brandon Regional Medical Center*, supra, 346 NLRB at 200.

Member Liebman, for the reasons expressed in her concurrence in *Brandon Regional Medical Center*, supra, emphasizes that picketing is differentiated from handbilling or other forms of mere persuasion by its association with some form of conduct that effectively creates a physical or symbolic barrier. In her view, picketing is defined not by the mere presence of individuals, but by conduct that results in a coercive confrontation. See *Chicago Typographical Union No. 16 (Alden Press)*, 151 NLRB 1666, 1669 (1965) ("The Board has held that not all patrolling constitutes picketing in the statutory meaning of that term 'One of the necessary conditions of 'picketing' is a confrontation in some form' . . .").

The fact that the Respondent did not use picket signs is not controlling. *Jeddo Coal Co.*, 334 NLRB at 686. Moreover, one respondent agent momentarily blocked at least one employee of a neutral contractor—Joseph Dauman—from entering The Ranches' worksite. Dauman had not slowed to accept a handbill, or otherwise indicated a willingness to communicate with the Respondent's agents. When Dauman failed to heed the Respondent's agents, Dauman saw them taking note of the information on his license plate, which could be used to identify him, and then immediately communicating with someone by phone. Such intentional restraint of another person's freedom of movement, with the apparent collection of information regarding those who crossed onto the site, amounted to coercive confrontation. *Operating Engineers Local 17 (Hertz Equipment Rental)*, 335 NLRB 578, 584 (2001); *Big Horn Coal Co.*, 309 NLRB 255, 258 (1992). That coercion was unlawful under Section 8(b)(4)(ii)(B).

The Respondent's patrolling at The Ranches also constituted an unlawful inducement under Section 8(b)(4)(i)(B). In an attempt to argue the contrary, the Respondent claims that its protest was primarily directed at the public, and not at employees of contractors working onsite. However, the evidence establishes that the Respondent's agents arrived onsite each day at The Ranches location 2-1/2 hours before the sales office opened, at a time when only employees of contractors would encounter them. Thus, their activities, including patrolling and the blocking of the entrance, were plainly directed at employees of neutral companies. As noted above, the Respondent also temporarily blocked employee Dauman's entry to the jobsite, thereby inducing him not to work, in violation of Section 8(b)(4)(i)(B).

Under these circumstances, we find that the Respondent's protest activities at The Ranches constituted unlawful picketing under Section 8(b)(4)(i) and (ii)(B).⁶ Having found the alleged violations on this basis, it is therefore unnecessary to consider the further implications of the Respondent's use of an inflated rat, and we do not pass on the judge's conclusion that the Respondent's deployment of the rat itself constituted signal picketing.

2. As described above, the judge also concluded that the Respondent violated Section 8(b)(7)(C) at all three jobsites by engaging in recognitional picketing for an

⁶ We find it unnecessary to rely on the judge's discussion of the Respondent's conduct in relation to The Ranches' implementation of a reserve gate system at the Mt. Sinai site. Our finding that the Respondent engaged in prohibited conduct is supported by the Respondent's initial picketing at this site, which occurred prior to the creation of the reserve gate system and by Silva's October 30 letter to The Ranches stating a proscribed cease-doing-business objective with respect to this neutral employer.

unreasonable period of time in the absence of an election petition. We have applied Section 8(b)(7)(C) to bar recognitional picketing exceeding 30 consecutive days, relying on the clear statutory language. *Retail Wholesale Union District 65 (Eastern Camera & Photo Corp.)*, 141 NLRB 991, 999 (1963). However, the Board has held that recognitional picketing for fewer than 30-consecutive days may also be unlawful, where the picketing, albeit intermittent, spans a period longer than 30 days. *Electric Workers Local 265 (RP&M Electric)*, 236 NLRB 1333 (1978), *enfd.* 604 F.2d 1091 (8th Cir. 1979).⁷ In this case, the judge found that the Respondent's recognitional picketing intermittently conducted at the three separate jobsites over a period covering 4 months was unreasonable, even though the picketing occurred on only 28 specific days during that period. Under the precedent, we agree that the duration of the Respondent's picketing was unreasonable within the meaning of Section 8(b)(7)(C).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Laborers' Eastern Region Organizing Fund, its officers, agents, and representatives, shall take the actions set forth in the Order.

Richard Bock, Esq., for the General Counsel.

Lowell Peterson, Esq. (Meyer, Suozzi, English & Klein, P.C.), of New York, New York, for the Respondent.

Steven M. Coren, Esq. (Coren & Braun, Esqs.), of New York, New York, for the Charging Party.

Richard B. Ziskin, Esq. (The Ziskin Law Firm, LLP), of Commack, New York, for Charging Party The Ranches at Mt. Sinai.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon a charge in Case No. 29-CC-1422 filed by The Ranches at Mt. Sinai (The Ranches) on March 17, 2003, and based upon a charge in Case No. 29-CP-662 filed by Concrete Structures, Inc. (Concrete) on November 15, 2002, a complaint, as amended at the hearing, was issued on April 9, 2003 against Laborers' Eastern Region Organizing Fund (Respondent or the Union).

The complaint alleges essentially that the Respondent erected a large inflatable rat and distributed handbills at three construction jobsites where Concrete performed work, with an object of forcing Concrete to recognize and bargain with it as the collective-bargaining representative of Concrete's employees in violation of Section 8(b)(4) and (7)(C) of the Act. It is

further alleged that the Respondent's conduct at The Ranches jobsite had as its object forcing or requiring The Ranches to cease doing business with Concrete in violation of Section 8(b)(4)(i) and (ii)(B).

The Respondent's answer denied the material allegations of the complaint and asserted certain affirmative defenses, including that its activities, which did not involve picketing, constituted expressive acts protected by the First Amendment to the United States Constitution, and the publicity provisos of Section 8(b)(4) and (7) of the Act.

Prior to the opening of the hearing, the Respondent filed a Motion for Summary Judgment with the Board. On November 18, 2003, the Board denied the motion and remanded the case for hearing. The Board noted that the General Counsel argued that he should be given the opportunity to present evidence to establish that, in the construction industry, the rat is commonly understood to communicate the same message as actual picketing. The Board stated that "we agree with the General Counsel that, in view of the novelty of this issue, a fully developed record would assist in our determination whether the Respondent committed the unfair labor practices alleged."

On February 28, March 1 and 2, 2005, a hearing was held before me in Brooklyn, New York.¹

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Ranches, a domestic corporation, having its office and place of business at 760 Route 25A, Mt. Sinai, New York, has been engaged in the construction of a residential housing development. During the past year, The Ranches purchased and received at its Mt. Sinai facility, products, goods, and materials valued in excess of \$50,000 directly from firms located outside New York State.

Concrete, a domestic corporation having its office and place of business at 2380 Pond Road, Ronkonkoma, New York, has been a concrete contractor in the construction industry. During the past year, Concrete purchased and received at its Ronkonkoma facility, products, goods, and materials valued in excess of \$50,000 directly from firms located outside New York State.

The Respondent admits, and I find that The Ranches and Concrete are employers engaged in commerce within the meaning of Sections 2(2), (6), and (7) and 8(b)(4)(B) of the Act, and that it is a labor organization within the meaning of Section (5) of the Act.

¹ Following the close of the hearing, I received, pursuant to agreement reached at the hearing, R. Exhs. 18 and 19, a translation of a videotape and a reduced image of a picket sign, respectively. Those exhibits have been included in the Respondent's exhibit file.

The General Counsel's unopposed motion to correct the transcript is granted. Appendix B contains the corrections [omitted from publication].

⁷ See also *Operating Engineers Local 4 (Seaward Construction Co.)*, 193 NLRB 632 (1971), and *Butchers' Union Local 120 (M. Moniz Portuguese Sausage Factory)*, 160 NLRB 1465, 1469 (1966).

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

This case essentially involves the question of whether hand-billing accompanied by the presence of a large, inflated rat balloon at a construction site by a union having a labor dispute with a company performing work at that jobsite, constitutes unlawful signal picketing in violation of the Act. The Respondent did not utilize agents wearing or carrying picket signs at any of the jobsites involved herein, but a sign stating "Concrete Structures" was displayed on the rat.²

The Respondent is an organizing fund whose function is to organize nonunion companies and engage in organizational activities on behalf of the Laborers' International Union of North America (LIUNA). General Building Laborers' Local Union No. 66, whose jurisdiction generally includes concrete and related work, is an affiliate member of LIUNA through the Mason Tenders District Council.

B. The Jobsites

1. Mills Pond Elementary School

Concrete performs such work as pouring concrete for building foundations, curbs and sidewalks. It employs about 30 workers. Americo Magalhaes, the president of Concrete, testified that in 2002, he was asked each month by Byron Silva, the respondent's regional coordinator, to sign a contract with Local 66. In June or July 2002, Silva again asked him to sign a contract, and Magalhaes refused.

In July 2002, Concrete's employees were employed at a construction site at the Mills Pond Elementary School in Smithtown, New York. The Respondent's answer admits that for about 2 weeks in July 2002 at this jobsite, it erected a 15-foot inflatable rat with a sign positioned on the rat's midsection stating "Concrete Structures," and distributed handbills containing a photograph of a cracked concrete curb, which stated:

Watch Your Steps

Your children may get hurt walking on the new curves [sic] just built two weeks ago and they are already cracked.

Who is responsible for all this mess????

CONCRETE STRUCTURES

Who is responsible to have a RAT in front of Mill Pond School???

CONCRETE STRUCTURES

Call Americo Magalhaes

Owner of Concrete Structures

At 631-588-7613 and ask:

Americo was the foundation of the school built the same way???

Americo How much money [sic] the taxpayers have to pay to fix the problem???

Americo Why [sic] our children have to be exposed to this dangerous situation.

² The rat presents an imposing figure. The rats here were 15- or 30-foot high. The body of the rat is gray with pink eyes, ears and nose. It sits on its haunches with its front paws outstretched and claws extended. Its mouth is open, baring its teeth.

Laborer's Local 66
Laborer's Eastern Region
Justice in Concrete
631-753-0756

This dispute is only with the above named employer Concrete Structures. We are not asking other employees of other employers to stop, [sic] nor are we asking any members of the public to participate.

Labor Donate [sic]

On July 15, the Respondent attempted to place the rat at the entrance to the jobsite, but was required by the police to set it up on a road opposite and across the street from the school construction site, where handbilling occurred. Silva testified that the purpose of the handbills was to call the attention of the taxpayers and parents of the students to the fact that Concrete was working at the jobsite. He stated that it was not the Respondent's intent to cause people to cease work or to cause anyone to refuse to make deliveries.

Magalhaes stated that the Union's agents paced back and forth near the rat while giving handbills to pedestrians, including school board members and parents of students. On July 16, Silva asked Magalhaes to sign a contract with Local 66, saying that the rat would remain at the jobsite, and the handbilling would continue.

At a meeting on July 17, Silva gave Magalhaes a sample collective-bargaining agreement of Local 66 effective from July 1, 1999, to June 30, 2002. During that meeting, Magalhaes was not asked any questions concerning the quality of the work performed by his company. The Respondent's answer admits that in about mid-August 2002, Silva demanded that Concrete recognize, bargain with and sign a contract with a local union affiliated with the Respondent.

2. Harborview Townhouses

In September 2002, Concrete's employees were employed at a construction site at the Harborview Townhouses in Roslyn, New York. The Respondent's answer admits that for about 2 days in September 2002, it distributed handbills and erected a 30-foot inflatable rat with a sign positioned on the rat's midsection stating "Concrete Structures." The purpose of the handbills, according to Silva, was to alert the public to the fact that Concrete was working at the site. The handbills stated:

Check Your Bill

Has Marriott Charged You Too Much?

Marriott International has a history of charging Customers for such frivolous items as electricity!

Recently, Marriott paid over \$400 million to stockholders After accounting problems were discovered.

They are also using Concrete Structures on their Port Washington, NY project, who is a contractor with a history of shoddy work.

Call CEO JW Marriott @ (301) 380-1825 and ask him if you are paying for his mistakes and Concrete Structures shoddy work!

Justice in Concrete
Laborers' Eastern Region Organizing Fund
631-753-0756

This dispute is only with the above employer, Concrete Structures, Inc. We are not asking other employees of other employers to stop work. Nor are we asking any member of the public to participate.

Labor Donated

The Respondent attempted to erect the rat at the corner of the jobsite, but was required to move it, so that it sat on the median strip of a public street 250 feet from the jobsite entrance, and about one-quarter mile from the jobsite itself, which was located inside a golf course.³ Magalhaes testified that he saw two or three union agents pace back and forth at the rat, distributing handbills to pedestrians, homeowners, and those driving past the site.⁴

3. The Ranches at Mt. Sinai

In March 2002, Concrete began work at The Ranches at Mt. Sinai, New York, at which 186 residential homes were being built on a 33 acre site. TiBi Contracting, Inc. a general contractor for The Ranches, entered into contracts with 20 to 30 sub-contractors, including Concrete, to perform work at the site.

On October 28, 2002, the Respondent erected a 30-foot high, 12- to 15-foot wide inflated rat at the main, front entrance, with a sign positioned on the rat's midsection stating "Concrete Structures." The sign was placed on the rat, according to Silva, to identify "who the problem was with," and to have Concrete sign a contract with Local 66. Accompanying the rat were two union agents who distributed handbills to motorists. At least one of the handbillers wore a Laborers' Union jacket with the writing "Organizer" on it. Silva's notes of that day stated that we "set up the line around 8:30." Silva testified that he decided to use a rat and handbillers because he expected that it would be "effective" since potential home purchasers visiting The Ranches would immediately notice the rat, and would inquire as to what was happening. The purpose of the demonstration was to draw attention to the fact that Concrete was working at the site. Motorists entering the site had to slow down in order to turn onto the site, passing the rat. Two handbills were distributed. One of them stated:

The Ranches at Mount Sinai
BUYER BEWARE
The "old charm" of Long Lake Development⁵
Is not all its [sic] *cracked* up to be!
Long Lake Development has hired Concrete Structures for
concrete work on this project.

³ Silva testified that the rat was positioned one-quarter mile from the entrance.

⁴ Magalhaes later testified that no pedestrians walked in the vicinity of the rat.

⁵ According to an official of Tibi, Long Lake Development was a prior construction project in another area which did not involve Tibi, and was not involved with The Ranches project.

Concrete Structures has a history of poor work, such as cracking in the concrete of the Mill Pond E.S. in Smithtown after just two weeks.

If you are considering buy [sic] a house at this location call Americo Magalhaes @ (631) 588-7613

Ask him for a guarantee that the concrete will not crack or crumble after two months.⁶

Justice in Concrete
(631) 733-0756

This is directed to the public. We are not asking anyone to cease work or stop deliveries.

Labor Donated (Emphasis in original)

The other handbill was identical to this one, except the words "The Ranches at Mount Sinai" were omitted, and the reader was asked to call Nick Cassis, an official of TiBi, and not Magalhaes.

Silva testified that immediately after the erection of the rat, he was asked by Local 66 President Robert Bonanza whether "we have a picket line." Silva replied, "[W]e had only (2 guys) hand bill and the rat." Bonanza told Silva that an agent of Local 282 Teamsters which represents drivers who deliver concrete, told him that one of his contractors, Scalandre Corp., was delivering concrete to the site, and he wanted to know whether there was a problem, and what the situation was at the jobsite. In addition, a Scalandre official told Silva that he was concerned about losing the job, and asked him what was going on. Silva told him that he did not ask anyone to stop work, and that "everything is fine, go do your job." Silva stated that the Scalandre representative drove him around the project, showing him that the project was nearly finished, and that Concrete had only a few units to complete. Silva's notes stated that the Local 282 agent said that the "company [Scalandre] is going to honor the line even if it is informational. . . ." but then was advised that Local 282 drivers would not make deliveries only in the event that a picket line was established. Silva's notes indicate that he did not want to do anything to hurt a "union company."

Magalhaes testified that he advised his unionized concrete supplier that an inflated rat was present and the laborers were picketing, and asked if the supplier's drivers would cross the "picket line." The supplier advised that the drivers would not enter the jobsite if an inflated rat was present, and Magalhaes obtained another supplier. There is some question as to this testimony since no company, other than Scalandre, was identified as delivering concrete to Concrete Structures. I note that Seville Ready Mix was listed on Antonucci's letter of October 31 as one of the contractors which should use the neutral reserved gate, and therefore it presumably was not a supplier of Concrete.

On October 30, Silva sent the following letter to Ranches official Cassis:

⁶ Silva testified that on October 29, he was informed that a resident of The Ranches, Jenny Otto, who is also a member of Local 66, told the Respondent's organizers that she had problems with the concrete work at her house.

The Laborers' Eastern Region represents over 40,000 construction workers who live and work in New Jersey, Delaware and New York.

We are presently engaged in a Long Island campaign of the concrete industry to monitor concrete contractors to ensure compliance with those laws that govern and directly affect the health and safety of these construction workers, as well as the communities they work in, and the overall completion of these public works projects.⁷ To achieve this objective, we have been investigating any irregularities and working closely with awarding agencies to promote safety and fairness in all projects.

We believe the workers' and public's interest is best served when public contracts are awarded to the lowest, *responsible* bidder. In our experience a non-responsible bidder can be a burden to the awarding agency.

Through our research and job-site investigations, we have discovered concrete contractors we believe to have blatant disregard for the prevailing wage laws as well as health and safety issues surrounding construction.

Among other issues that are commonly faced on construction sites, our investigation shows that the concrete industry contractors habitually do not pay their workers the prevailing wage, as required by law. They also do not seem to use workers who are experienced and trained, a dangerous start to any project. Perhaps this is why they end up with cost over-runs, lawsuits, shoddy work, and injured workers.

We have included a packet of information regarding Concrete Structures, Inc. It is our contention that Concrete Structures Inc. is not the most reputable contractor for your project based on the evidence provided in this packet. There are other instances that we are in the process of investigating that way [sic] show additional violations of other laws made by this contractor.

We ask that this project be awarded to a contractor that is *responsible*. We feel obligated to inform you that we have launched and will continue to execute a publicity campaign against such inferior contractors for their many questionable practices and will do so at any site in which they have been hired to work.

Please review this information and contact us with any comments or questions. We look forward to working with you to insure compliance and accountability by all construction contractors. Your cooperation would be greatly appreciated. [Emphasis in original.]

Attached to the letter was a two page document entitled "Serious Questions Regarding Concrete Structures' Past and Future." It asserted that, according to a New York State Department of Labor list, Concrete was fined for not complying with the prevailing wage law, and that it "bilked workers and tax-

⁷ Silva testified that this campaign had been ongoing for about one year, and that the Respondent sent similar letters, with similar attachments, regarding other contractors to public officials, general contractors and developers.

payers out of hard earned dollars."⁸ The letter also asserted that Concrete had serious safety violations of the Occupational Safety and Health Act (OSHA), with fines of \$6900, which shows "a general trend of lawlessness that could jeopardize the completion of your project." The Respondent obtained this information from the OSHA website which listed Concrete's violations in 1997, 1999, and 2000.

The letter also referred to photographs of cracked concrete at the Mill Pond School which "jeopardized the structural integrity of the building and surrounding area, posing a long term hazard to its future occupants." It noted that the cracks appeared only days after it was poured by Concrete. Finally, the letter stated that companies owned by Magalhaes in Connecticut, including one named Concrete Structures, "went under." It claimed that according to Dun and Bradstreet, Concrete Structures of New York "has a history of failing to pay its bills on time. Financial stress such as this could hinder the completion of a project if concrete deliveries are slowed or stopped because of a contractor's failure to pay his bills."

Silva testified that, in asking that a different contractor be awarded the contract, he was aware that the contract had already been awarded to Concrete, and that it had been working at the jobsite for many months and had nearly completed the job. Nevertheless, he did not regard Concrete as a responsible contractor because it had OSHA violations and its concrete work was shoddy. His purpose in writing the letter was to advise The Ranches what he knew about Concrete, and also that "we're trying to sit down with [Magalhaes] and discuss our issues," but not necessarily to have him sign a contract with the Union.

Robert Antonucci, the project manager for TiBi and vice president of construction for The Ranches, testified that on October 29, he noticed that the employees of two subcontractors, Three Brothers Electric and Triangle Building, were not at work, and that S.A. Anderson was not making deliveries of supplies to subcontractor Master Cooling. Antonucci learned from his superintendent that the employees of those three companies arrived at the entrance of the jobsite but did not enter it because there were "union problems."

On October 31, Antonucci sent a letter to the Respondent which stated, in relevant part:

Our company has been advised that the Laborers Eastern Region Organizing Fund and/or Laborers Local 66 has commenced picketing on October 28, 2002 at the above-mentioned location.

The letter advised that one reserved gate had been established for the exclusive use of Concrete and its employees, suppliers, customers and visitors, and another, neutral reserved gate had been established for the residents of The Ranches and other contractors and their employees, including Master Cooling, Three Brothers Electric, and Triangle Building Products.

⁸ The Respondent obtained from the New York State Department of Labor, a list of "non-willful" violators of the prevailing wage law, listing Concrete Structures, Inc.. The violation date is 1992. Magalhaes claimed that Concrete has been in business only since 1994, which casts some doubt on whether this listing refers to the company at issue here.

Silva denied receiving the letter. Fabio Morales, one of the organizers, was handed the letter but he refused to accept it. However, Silva read the signs on both reserved gates. Antonucci testified that the Respondent did not request permission to enter the premises or erect a rat or demonstrate at that part of the jobsite where Concrete was working.

On November 1, The Ranches established and maintained two gates at the jobsite. Gate 1, in the rear of the property, was reserved for the exclusive use of Concrete and its employees, suppliers, customers and visitors. Gate 2, at the main, front entrance to the site, was reserved for the exclusive use of the residents of The Ranches and all others doing business with The Ranches, and their employees, suppliers, delivery persons, customers and visitors. After the establishment of the reserved gates, the employees of Three Brothers and Triangle Building entered the jobsite and resumed work. Antonucci stated that since Triangle's drivers would not enter the site at gate 2 where the rat was situated, its driver used gate 1, which was the gate reserved for Concrete. In addition, the employees of S.A. Anderson would not deliver materials to the site, so they met subcontractor Master Cooling off site and transferred the materials to its truck. Master Cooling then brought the materials onto the site and performed the work. Antonucci did not recall seeing any Respondent agent speak to any employees of the subcontractors, but he did see them talking to people entering the jobsite and attempting to speak to occupants of vehicles entering the site.

The Respondent's answer admitted that, from November 1 to 15, following the establishment of the reserved gates, it maintained the rat and engaged in handbilling at gate 2, in the same manner as it had as set forth above, on October 28.

According to Antonucci, all the workers and construction vehicles used gate 2 to enter the premises. Silva stated that following the establishment of the reserved gates, he noticed that Concrete's employees and vehicles continued to use gate 2 at the main entrance of the jobsite although they were supposed to use gate 1, at the rear of the jobsite. He testified that the Respondent maintained the rat at the main entrance because that gate was being used by Concrete, and also because the Respondent had no picket line, and thus he saw no need to observe the reserved gate system. He did not notify The Ranches that Concrete was using the wrong gate. Silva maintained that the handbillers did not chant, patrol, or block traffic, pedestrians, or the entrance to the jobsite. He instructed the handbillers to offer a handbill to pedestrians and drivers, but if one was refused, not to insist that it be taken. He noted that if the handbiller was on one side of the street and a car on the other side, the handbiller had to cross the street to offer a handbill.

According to Magalhaes, the Respondent's agents walked back and forth in front of the rat at the main entrance gate 2, and were present 8 hours per day, from about 7:30 a.m. when the construction workers arrived, until 5 or 6 p.m., handbilling the homeowners whose homes were already built, and also prospective homebuyers who visited the site when the sales office was open between 10 a.m. and 5 p.m., or later by appointment. The actual worksite at which Concrete's employees were working was about 500 feet from the entrance to the jobsite. Antonucci stated that on occasion the agents walked back

and forth across the entrance to the jobsite, interfering with homeowners entering and leaving, and at other times, just stood next to the rat.

Joseph Dauman, a heavy equipment apprentice for nonunion Suffolk Paving Corporation, worked at The Ranches jobsite for about eight days. He testified that the Union's agents did not walk back and forth across the entrance, but "formed" in the entrance and then separated to permit cars to pass. When he drove through the main entrance gate, the Respondent's agents looked at his vehicle's license plate and made a phone call after he entered.

On November 4, Antonucci sent a letter to Concrete owner Magalhaes which stated:

Please be advised that your contract will be terminated on November 8, 2002. The cause for terminate [sic] is that you are unable to perform as per your contract. I understand that the union picketers in front have caused your delays, but we have a project to complete. I have filed an injunction to have them move to a reserved gate but they have not. Be advised that we will also seek to recover any and all damages that have been caused by this labor disruption.

After receiving the letter, Magalhaes spoke to Antonucci about the Respondent's conduct. In their conversation, they both referred to the Respondent's actions as "picketing," and its agents as "picketers."

Magalhaes also called Respondent official Silva, requesting a meeting in order to obtain some accommodation which would enable Concrete to finish the project. At that time, Concrete had been working at the jobsite for about 1 year, and had about 10 percent to 15 percent of the job left to complete. On November 6, Magalhaes met with Silva, Bonanza, the president of Local 66, and others. Magalhaes testified that the Respondent's representatives "put pressure on me to sign a contract. . . . They said to me that they wanted me to join the union and sign a contract and I told them that I wouldn't." Magalhaes asked them why they wanted him to sign a contract if they believed that his work was inferior. Magalhaes testified that Silva simply "shrugged." Silva stated that he told Magalhaes that the Union could train his workers if their work was of poor quality. Magalhaes told them that, in addition to the commercial work at The Ranches, he also did residential work for which there was no union rate. The agents asked him to set a residential rate and call them within 1 week during which time they would remove the rat. The Respondent withdrew its rat and engaged in no handbilling at the jobsite during the following week. However, when Magalhaes failed to call the Respondent, the rat was again erected and the handbilling resumed.

Silva conceded that the Respondent sought to represent the employees of Concrete, and admits asking Magalhaes on November 6 to sign a contract with Local 66, explaining that he was trying to reach an agreement with Magalhaes.

On November 13, Antonucci sent another letter to Magalhaes advising him as follows:

Last week when we spoke, you stated that the picketers outside my gate would be gone. They were gone for about one week. As of 2:30 p.m. this afternoon, they returned to my job site.

As you are aware, I stated to you that your contract would be terminated if they returned. This letter is to inform you that as of November 13, 2002 at approximately 2:30 p.m. your contract is hereby terminated and we will be bringing in another concrete contractor at your expense.

Please note that all additional costs and damages will be deducted from your contract.

Concrete left the jobsite on November 13, and shortly thereafter, the Respondent removed its rat and the handbillers. Antonucci stated that when the rat and handbillers departed, there was no further issue concerning the delivery of supplies or whether contractors would work at the site.

On November 15, Silva was told by Local 66 President Bonanza that Teamster concrete supplier Scalandre advised that since Concrete was no longer on the project, it would be completing its contract with The Ranches. Scalandre requested that Bonanza ask Silva to remove the rat. Silva's supervisor, David Johnson, told Silva that if the Respondent obtained a letter from The Ranches saying that Concrete "no longer will work in the project, we could take the rat down." A letter to that effect was faxed to the Respondent, and the rat and the handbillers were removed that day. Silva testified that he removed the rat because Scalandre explained to Bonanza that since Concrete was gone it (Scalandre) did not want to "get hurt" because it was afraid of losing its contract with The Ranches. Silva expressed the belief that the Respondent could help Scalandre by removing the rat, and if it did not, Scalandre might blame the Respondent because of its presence at the project. Silva explained that although it still had a dispute with Concrete, there was no reason to wait before it removed the rat. Silva stated that after the Respondent left the jobsite, he did not pursue any issue concerning Concrete's work at other jobsites.

In about 2 weeks, Concrete returned to work at The Ranches. However, the Respondent did not return since it was busy with other matters.

C. Allegations of Poor Work by Concrete

Silva stated that he took the photograph of the cracked concrete curb at the Mills Pond School which was included in the handbill distributed there, and referred to in The Ranches handbill. He admittedly did not know how or why the curb, which was poured by Concrete, was cracked, but stated that it should not have cracked after having been poured only a few weeks before. He expressed his belief that the crack may have been caused by poor workmanship—too much water in the concrete, an improper excavation, or the subgrade was not firmly compacted. He conceded that it could have been cracked if a vehicle ran into it.

Magalhaes denied that Concrete cracked the curb pictured in the handbill, or performed shoddy work. Antonucci stated that, in his 10-year experience with Concrete, during which it had poured concrete for 600 housing units, he was not aware that any concrete poured by it had cracked. However, he stated that following the erection of the rat he received many complaints regarding concrete work at The Ranches project. No complaints had been received prior to the rat's arrival. However, it should be noted that documents received in evidence establish that The Ranches received complaints concerning cracked cement steps

on July 30, 2002, before the erection of the rat. Whether those cracks were the fault of Concrete has not been established. In addition, The Ranches had received a complaint concerning alleged structural damage to a concrete platform and steps at Long Lake in August 2002, which it referred to Concrete. A question was raised at the hearing, which has also not been resolved, as to whether Concrete poured that platform and steps.

D. Opinions Regarding the use and Effect of the Rat at Construction Sites

1. The General Counsel's evidence

Concrete's president Magalhaes has been in the construction industry for 11 years. A rat and handbilling have taken place at every other job his company has engaged in. He stated that in the construction industry the presence of a rat is synonymous with a "picket." Magalhaes stated that before the construction unions used an inflated rat, they would place 50 to 60 people on a line at the entrance to a jobsite, with or without picket signs. However, once the rat was employed, fewer people were needed because people approaching the area "automatically" knew that the rat represents a picket line. Magalhaes gave his opinion that employees represented by a union would not enter or work at a jobsite having an inflated rat.

The Ranches' official, Antonucci, stated that he has seen a rat at jobsites, although this was the first time one was used at one of his projects. He testified that the presence of a rat indicates that the job is being picketed, which is why he stated in his letters to Concrete that pickets were at the site. After the erection of the rat at The Ranches, he received a call from a contractor and a building inspector, asking why the project was being picketed.

Michael Loturco, the vice president of LNV Site Development, a nonunion contractor who has been in the construction industry for 30 years, testified that a rat was erected at several jobs that he was involved with. He stated that the presence of a rat is synonymous with a picket line, which to him indicates that the demonstrating union wants the job to become unionized, and that it is attempting to interfere with deliveries, make the job slow or shut down, and intimidate the nonunion workers. He further stated that he cannot get deliveries from his unionized precast concrete manufacturer whether there is a traditional picket line with pickets wearing signs, or just a rat, adding that the employees of those companies will not enter a jobsite in either case.

Todd Panzner, the president of Panzner Environmental Corp., a nonunion company performing asbestos abatement and demolition, has been in the construction industry for 30 years. He has observed demonstrations where the union displays a rat with handbills only, and jobsites where a rat is accompanied by patrolling pickets wearing picket signs. In Panzner's opinion, there is no difference in effect between either type of action, and he believes that the rat symbolizes that a nonunion company is working at the targeted jobsite.

Panzner cited an instance involving his work at a Garden City, Long Island renovation project. Laborers Union Local 78 erected a rat with handbillers, but no traditional picketing at the office building of the project owner, Albanese Development,

which was across the street from the jobsite. No one refused to work at the jobsite and no one refused to make deliveries. This might be explained by the fact that Panzner was the first trade at the jobsite, being involved with demolition and asbestos removal of the existing structure. Panzner spoke with Local 78 president Edison Sevarino before the rat was inflated. Sevarino said that he wanted the job performed by union labor. At a meeting with Sevarino, Panzner offered to employ some union laborers but Sevarino wanted the job to be completely staffed with workers represented by Local 78. A rat was also erected at that time at a location owned by Albanese in Manhattan, at which Panzner was not working and had never worked.

At a jobsite in Levittown, Long Island in April, 2004, Local 66 erected a rat, and engaged in handbilling and traditional picketing with 10 to 12 pickets carrying signs that said that the union was opposed to Panzner working at the site. Other trades which were working at the jobsite did not stop work. Panzner worked at the jobsite for 6 weeks, and was then removed by the nonunion general contractor.

James Sutherland, the president and owner of Highland Corporation, a nonunion carpentry subcontractor, has been in the construction industry for 30 years. He has seen rats erected at jobs that his company performed, and at jobs he was involved with. Sutherland believes that the rat indicates to the trades working at a jobsite that there is a "labor problem" there. He stated that the rat's message is the same as that conveyed by a conventional picket line and picket sign. Sutherland expressed his opinion that the message given by a rat with handbillers is the same as the message expressed by traditional picketing with picket signs.

David Wenger, the president of L.D. Wenger Corp., a general contractor, has been in the construction industry for 25 years. He first saw a rat erected at one of his projects in the summer of 2004, and has seen them for 10 years. He stated that they are more visible than two or three people wearing picket signs. In his opinion, a rat signifies that there is a labor dispute on the job. In Wenger's opinion based on his experience, there was no difference between the message given by a rat accompanied by handbillers and pickets carrying picket signs inasmuch as they have the same effect on workers attempting to enter a jobsite. However, he also stated that an inflated rat would not prevent work from being done at nonunion construction sites, but that deliveries made by a union truckdriver may not be made, depending on the driver.

Wenger testified that in the summer of 2004, he was the general contractor for a pool restoration in the Town of Brookhaven in Long Island. During the progress of the job, Local 66 first picketed the job with a picket line and picket signs. Then it negotiated with Wenger in an effort to have him use all union labor on the project. Thereafter, Local 66 erected a rat with handbillers, but on occasion would alternate, on different days, the use of pickets and the rat with handbillers. When it used the rat, a picket sign was posted on the rat. Wenger stated that the impact was the same—the mechanical and electrical trades people would not work regardless of whether traditional picketing took place or the rat was present with handbillers.

During the same period of time, Wenger won a contract involving the construction of a library in the Town of Babylon,

Long Island. After the bids for the project were opened, but before Wenger was awarded the contract, a rat was erected on a flat bed truck, accompanied by a handbiller. The handbills were in protest of Wenger's bid being accepted. No work was being performed at that time. Prior to this demonstration, a representative of Local 66, Andrew Culpepper, asked Wenger whether he intended to sign a contract with that union. Wenger replied that the project was a prevailing wage job, and that he would not sign such a contract. He told Culpepper that he was not anti-union, and asked for the names of union contractors so that he could consider them.

Ruth Mulford, the regional vice president of the New York chapter of the Associated Builders and Contractors (ABC), testified that she has seen an inflated rat at about 30 to 40 jobsites in the past couple of years, and rats have been erected outside her office where no construction work has been ongoing, in support of a union's belief that ABC is antiunion. ABC has a large, inflated cat balloon which it used at a jobsite in response to a picket line comprising 2000 people and four rats. The cat was used as a symbol that the nonunion companies being targeted would not be intimidated by that mass demonstration.

Mulford stated that when a rat is erected at a jobsite, she often receives calls from ABC's member contractors expressing fear that they will lose their contracts. It is her opinion that the rat causes people to be afraid for their safety since it looks "onerous," but added that when the rat is accompanied by only two handbillers, there were no concerns about safety. She further stated that an inflated rat has the same meaning as picketing—an inference that there will be trouble, problems or possibly violence at the jobsite. Mulford testified that with the early use of the rat, it was accompanied by large numbers of demonstrators, but lately only one or two people are present with the rat.

Mulford said that the reaction of the contractors to the rat varied with their experience. Some general contractors take no action such as establishing reserved gates or calling the police, and work continues at the jobsite. In other instances, the general contractor will terminate its contract with the subcontractor because it does not wish to have work stoppages or disruption at the jobsite. She stated that unionized trades will not enter the worksite in the presence of a picket line or a rat with handbillers, and that the meaning of both types of demonstrations is the same. Mulford's interpretation of the presence of an inflated rat is that organized labor is protesting that "scab labor" is performing work at the jobsite, and that the company which is the object of the picketing is doing work that should be done by a company having a contract with a union, or that it is in violation in some way.

Eric Andrews, an employee of Valentine Electric, Inc. which does not have a contract with a union, stated that in his 6-1/2 years performing electrical work, he has worked at one jobsite at which a rat was erected, and has seen rats at other sites he has not worked on. He believes that the presence of a rat is the same as a traditional picket line with pickets wearing picket signs. The jobsite at which he was working involved the erection of a rat by an electrical workers union accompanied by pickets. Workers who were represented by unions refused to cross the picket line, and no deliveries were received.

Joseph Dauman has worked in the construction industry for 3 years, and has seen the rat erected at jobsites about eight times. He stated that the rat represents a “union line” or picket line, and sends the same message if it stands alone, or is accompanied by people carrying picket signs, indicating that a nonunion employer is working at the jobsite. Dauman testified that whenever he is at a jobsite containing a rat, he calls his employer and advises that a rat is present, because he is concerned about the safety of himself and his family. He suggested that a rat or picket line is intended to frighten people. He stated that the “reaction” by unionized employees when they observe a rat at a jobsite is that they “tend” not to enter the area and deliver materials.

2. The Respondent’s evidence

The Respondent’s answer admits that it has been engaged in a labor dispute with Concrete, and denies that it has been engaged in a labor dispute with The Ranches. The Respondent also admits that (a) it has not been certified by the Board as the collective-bargaining representative of the employees of Concrete, and (b) no valid petition has been filed in which it sought to represent the employees of Concrete.

The Respondent did not tell anyone entering The Ranches that the purpose of its presence was to advise the public that the Respondent did not have a contract with Concrete. The Respondent denies that it has engaged in picketing at any of the three jobsites, and contends that all of the handbills, which were directed at the public and not at construction workers, truthfully stated what it believed were the facts concerning Concrete’s work.

The Respondent owns 10 rats. Locals 66 and 78 own two each. Respondent official Silva testified that he has used the rat about 300 times during the past 6 years. About 250 of those occasions have been at construction sites. An inflated rat is used in two different contexts: First, at jobsites to call to the public’s attention to the fact that it has a “problem” with a company or person, and second, away from the jobsites, as an aid in protesting social issues.

With respect to the latter, social type of demonstration, the Respondent erected a rat to protest the public comments by baseball player John Rocker concerning New Yorkers and immigrants, and in support of a community organization which protested a group in Farmingville, Long Island, which sought the deportation of undocumented workers. The rat was also present in the Respondent’s support of legislation to build a West Side Stadium. In those instances, no work was being performed and no deliveries were being made, and in any event, there was no intent to interfere with such activities if they took place.

The rat, accompanied by handbillers, has also been erected at meetings of boards of education in order to inform the parents, teachers and other members of the public of the identity of the company expected to be awarded a construction contract. Silva testified that the rat was not erected in order to protest the awarding of the contract to a particular contractor, but to inform the public that the contractor would be a “problem” if it is working at the school. Such problems include where the contractor does not have a “good record” and might put the stu-

dents at risk. Silva stated that his purpose is not to cause a change in the contractor, which would not be done in any event. The rat has also been erected at the home of the contracting employer, and at office buildings where the contractor maintains its office, for the purpose of calling the attention of the public or its neighbors to the issue.⁹

Silva testified that in none of the above instances is the purpose of the rat to induce or encourage anyone to stop work or to refuse to make deliveries.

The Respondent also erects a rat with about two handbillers at jobsites where construction work is taking place. Its purpose in doing so is to call the attention of the public to “what’s going on.” He stated that, as in the above cases, it is not the purpose of such a demonstration to prevent anyone from working or to interfere with deliveries to the jobsite. He conceded, however, that because the rat is huge, and is visible 30 to 50 yards away, he could not determine whether a union-represented driver, viewing the rat, simply drives past it without entering the jobsite.

Silva stated that the Respondent’s purpose in erecting a rat at the Mills Pond, Harborview and The Ranches jobsites was to bring to the attention of the public that Concrete was working at the job site, and in order to “sit down with [Magalhaes] and discuss our issues,” and have him sign a contract.

Silva distinguished between a picket line and a rat with handbillers, but without accompanying pickets. He stated that a picket line is established at a jobsite where there is a union presence in which the picket line seeks to bring the “problem” to the attention of the other building trades construction unions. In those cases, the Respondent advises the local unions having jurisdiction in that area, and those unions then contact the building trades unions. When a trucker approaches the site, the pickets speak to the driver and explain the situation at hand. If there is a picket line, which is comprised of people walking in circles wearing picket signs and chanting, the pickets try to obtain the support of the other trades to stop work by asking them to cease work or refuse to make deliveries. Although the drivers are not required to honor the picket line, they generally do not cross the line. Silva further testified that a picket line does not necessarily have as its purpose to cause a company to sign a contract with a union. It could be used to obtain better benefits for the workers. Silva believes that people would not enter a site at which a picket line was erected since they tend to support each other. However, he noted that the union member decides, on an individual basis, whether he will cross the picket line. Union member John Dougherty corroborated Silva’s testimony that the purpose of a picket line is to attempt to stop people from entering, and ensure that union contractors do not enter. As to those picket lines he observed, the message he received was that “something was wrong,” that there are violations on the job or the contractor was not paying the correct wages.

On the other hand, according to Silva, a rat accompanied by handbillers simply seeks the support of the public. According to him, such a demonstration does not constitute picketing. There

⁹ Where the Respondent has handbilled without a rat, the handbillers attracted no attention, and were mistaken for solicitors for a restaurant.

are no picket signs or chanting and the entrances are not patrolled. Silva does not call any other unions for assistance. The purpose and effect is not to shut down the job or have the union workers refuse to enter the jobsite. Similarly, the rat does not have the effect of stopping deliveries, and no deliveries are stopped. The drivers making deliveries generally say that they must enter the jobsite and the union agents say that is all right, since they are not asking anyone to refuse to enter. Silva does not believe that the rat causes nonunion workers to stop work when it is placed at a nonunion site.

Silva testified that in deciding whether to erect a rat, he considers that fact that people must stop and ask what is happening at the location. He conceded that a traditional picket line also has the effect of having people stop, and it too has as its purpose bringing attention to a labor dispute. He stated that people in the union construction industry view a rat at a construction site as signifying that there is a "problem," and they try to identify what kind of a problem it is—whether it is accompanied by a picket line or simply a demonstration. Those individuals usually stop and ask what the issue is, the handbillers explain what is happening, and then the drivers make their own decision as to whether to enter the jobsite, as the handbillers do not prevent anyone from working. He conceded that those in the "nonunion sector" believe that a rat is "just a straight picket line," but they do not have the knowledge to determine the meaning of the rat's presence at the site. He believed that people would stop and drive into a jobsite if they were given a handbill.

Moreover, the Respondent does not use the rat exclusively. It has utilized an inflated skunk, gorilla, and a cat holding a rat. Silva does not believe that there is any distinction in the meaning or use of any of the props the Respondent uses.

Salvatore Speziale, an official with Local 78, Laborers' Union which is involved with the removal of asbestos and hazardous waste, stated that Local 78 owns at least three rats, and also one which has a gorilla's head on a rat's body, which was used interchangeably with the rat balloons. Local 78 erected a minimum of one to three rats per day with two handbillers, rarely at construction sites, but mostly at office buildings and at building owners' residences. He stated that the union never targeted contractors with the use of a rat.

Speziale stated that the message given by the rat's presence is that there is a "problem" at that location where someone is being "exploited." In addition, the purpose of the demonstration is to embarrass the building owner who hired the irresponsible contractor performing the work. He identified an irresponsible contractor as one who is nonunion, "bottom of the barrel," and does not pay proper wages or fails to pay their workers on time, did illegal waste removals and failed to follow the Department of Environmental Protection guidelines. Speziale obtained such information from employees or from government filings, and used that material in handbills. He conceded that some union contractors also do not follow the rules, and at times, the union will handbill them with a rat. He advises the building owners as to the reputations of their "irresponsible contractors," and informs them of any violations they have committed. Occasionally, building owners asked him for a list of union contractors and such a list was supplied.

Speziale stated that the rat's purpose is also to inform the users of the building that, if asbestos was being removed illegally, they may be exposed to harmful asbestos fibers. He added that the union was benefited in such an endeavor because the tenants and others call the building owner and Government agencies. In addition, the employees performing the work call the union to complain about hazardous working conditions. As a result, the problems in the contractor's performance of the work are corrected, usually by the contractor itself. Speziale denied that the purpose of the protest is to cause a replacement by a union contractor because such a change would involve new filings with the Government agencies, a very time-consuming process which would rarely be done. A byproduct of this process is that once the improper practices are exposed, the building owner must pay more money in order to have the contractor perform the job in a proper manner, and possibly pay fines for the violations, and the job will take more time. Therefore, according to Speziale, the owner will, in the future, contract with a Local 78 contractor in order to avoid these problems.

Speziale testified that a picket line has the effect of causing union members to refuse to enter the jobsite and to stop work. In contrast, he believes that erecting a rat does not serve as a signal to employees not to provide services, and cannot be termed a picket line. He stated that Local 78's use of a rat never caused anyone not to work at a jobsite, and did not cause anyone to refuse to make deliveries, although he conceded that he could not know if someone who intended to enter the site did not do so when he saw the rat. He noted that the union has employed a rat at offices in which many union workers were employed, such as at Rockefeller Center, and no employees ceased work there. Occasionally, however, a construction worker employed in that building asked what was going on, was given a flyer and told that the demonstration was just informational, and its purpose was to advise the public of the matter.

Charles Rynkiewicz, the assistant director of market development for Laborers Union Local 79, testified that the rat itself signifies that there is a labor issue because in his experience, where a rat is erected, people will approach and ask what the issue is concerned with. His union erects rats at jobsites to advise the public that unsavory employment practices including dangerous conditions, low wages, exploitation of employees and undocumented employees are being utilized. He stated that in a majority of the cases, the person or party being protested against is the "rat." He terms a "rat contractor," from a construction worker's point of view, as a nonunion contractor, an employer which is not making benefit payments, does not pay his employees on time, utilizes unsafe work conditions, or exploits undocumented workers. He added that although such practices are also engaged in by union contractors, a majority of contractors engaging in such conduct are nonunion. Occasionally Local 79 has erected a rat against a Local 79 contractor where it is protesting its actions. In that case, a rat was placed at the contractor's offices and several jobsites.

In using the rat, Rynkiewicz attempts to get the community involved in the protest, either by delaying zoning variances that may be under consideration, or having the local community board protest the project. A rat is used because it attracts more attention than handbillers operating alone, and causes people to

approach to learn what the issue is, and also to sign petitions protesting the contractor's improper practices. Occasionally, when a rat is employed, the union's officials are interviewed by the media, and thus obtain wide publicity in their campaign concerning the developer or contractor and its employment practices. If the objectionable contractor was no longer present at the jobsite, the rat would be removed. If the targeted company was nonunion, and the erection of the rat caused the contractor's removal from the job, such an action would ultimately benefit Local 79 members if the general contractor retained a Local 79 company to replace the nonunion employer. Rynkiewicz also used the rat with handbillers in support of employees scheduled to vote in an NLRB election.

Rynkiewicz stated that the presence of a rat with handbillers does not cause jobs to be shut down or prevent deliveries from being made. The handbillers do not ask anyone not to enter a jobsite, and the handbillers do not ask anyone to cease work. Local 79 does not use the rat with pickets, essentially because it does not need pickets to draw attention to the issue since the rat is visible far from the site. He stated that pickets must make a personal approach, at the job entrance, asking a worker or visitor not to cross the picket line. No such personal appeal is used when a rat is displayed. If he was "going after" a specific job, and wanted that job to "go union," and he believed that it would be appropriate to encourage employees to refuse to work or to stop deliveries there, he would set up a picket line, whose purpose is to ask employees not to work at that job, to stop deliveries and slow down the job.

John Dougherty, a member of Local 79, has been in the construction industry since 1992. He has handbilled at construction sites about 30 times at which a rat was erected. On those occasions, he observed that construction workers and other employees enter the jobsite and report to work. He did not see employees refuse to enter the jobsite. While handbilling, he did not try to stop deliveries. He simply gave pedestrians a handbill and explained what the handbill says. He is not supposed to offer a handbill to the occupant of a vehicle, or to speak to a driver. He stated that, as a construction worker, the presence of a rat at a jobsite does not automatically mean that there is a picket line there. The rat's presence is meant to attract the public's attention, and then handbills are distributed to educate the reader. In those instances where he handbilled with the rat present at construction sites, Local 79 had a dispute with the contractor at that site, and people seemed to know that when a rat is erected, a union is involved.

Analysis and Discussion

The General Counsel argues that the evidence supports a finding that the Union's activities, including the erection of the rat combined with handbilling, constitutes picketing at the three jobsites at issue. He asserts that the rat operated as a "signal" to induce employees viewing it to refuse to cross the "line" where the rat was situated, and refuse to work at the three jobsites.

The Respondent asserts that its activities were not picketing and were not coercive. It does not contend that its activities were lawful because they were purely primary or that they had no recognitional object. Rather, it asserts that its conduct was not picketing, but instead constituted expressive acts protected

by the First Amendment and the publicity provisos of Section 8(b)(4) and (7). With regard to the latter claim, the Supreme Court has stated that the publicity proviso is an "interpretive, explanatory section" and not an "exception to an otherwise all-encompassing prohibition on publicity in Section 8(b)(4)." *DeBartolo II*, *infra* at 574. In addition, the Respondent did not tell anyone entering The Ranches that the purpose of its presence was to advise the public that the Respondent did not have a contract with Concrete. Accordingly, I reject the Respondent's defenses based on the publicity provisos of Section 8(b)(4) and (7).

Section 8(b)(4)(i) and (ii)(B)

Section 8(b)(4) states as follows:

It shall be an unfair labor practice for a labor organization or its agents—

(4)(i) to engage in, or to 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) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

(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 *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.

The statute reflects "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressure in controversies not their own." *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951).

Section 8(b)(4)(i) and (ii)(B) proscribes not only picketing but all conduct where a union coerces, threatens or restrains third parties to cease doing business with the primary employer with which it has a dispute, or induces or encourages employ-

ees of those neutral employers to stop work, although this need not be the union's sole objective. Whether a particular activity is prohibited by Section 8(b)(4) depends on the "coercive nature of the conduct, whether it be picketing or otherwise." *NLRB v. Fruit & Vegetable Packers Local 670*, 377 U.S. 58, 64 (1964).

"To establish a violation of the Act, there must be evidence showing, or from which it can be inferred, both that a respondent engaged in unlawful conduct, within the meaning of Section 8(b)(4)(i) or (ii) and, second evidence showing, or from which it can be inferred, that such conduct had an object proscribed by Section 8(b)(4)(B) of the Act. That is, a preponderance of the evidence must establish both unlawful conduct and unlawful action." *Iron Workers Local 386 (Warshawsky & Co.)*, 325 NLRB 748 (1998), rev. 182 F.3d 948 (D.C. Cir. 1999).

In *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const.*, 485 U.S. 568, 580 (1988) (*DeBartolo II*), the Supreme Court held that a union's peaceful distribution of area standard handbills urging a consumer boycott of neutral employers did not constitute restraint or coercion under Section 8(b)(4)(ii)(B). The Court noted that there would be serious doubts about whether Section 8(b)(4) could constitutionally ban peaceful handbilling not involving nonspeech elements. Due to First Amendment considerations, the Court interpreted the phrase "threaten, coerce, or restrain" with caution, and not with a broad sweep to exclude non-picketing activities partaking of free speech. Accordingly, the mere persuasion of customers not to patronize neutral establishments does not, in and of itself, coerce the establishments within the meaning Section 8(b)(4)(ii)(B).

The Respondent, relying on *DeBartolo II*, asserts that its conduct consisted of no more than occurred in that case—peaceful handbilling not involving picketing or patrolling. The Respondent argues that its handbilling represented no more than the expression of ideas, involving no nonspeech conduct since the rat was stationary, no picketing took place, and its agents did not patrol the area around the rat. The Union further argues that it conducted its activities at public thoroughfares at times and in circumstances in which the public would be likely to receive leaflets, at times when no construction workers entered or left any of the jobsites, and at times when no construction work was being performed. The Respondent asserts that its handbills were clearly directed at the public, addressing issues such as Concrete's quality of work and the effect of its work on taxpayers. According to the Respondent, the rat is a pure symbol, a pure expression, similar to its handbills.

The General Counsel argues, however, that the Respondent's actions went beyond peaceful handbilling. He asserts that its activities, taken as a whole and especially considering the enormous rat posted at the entrance to the jobsites, constituted a "signal" to approaching employees that they should not enter the worksites. He argues, therefore, that the Respondent engaged in "signal picketing" of the three facilities.

Handbilling has been distinguished from picketing in that picketing usually entails a patrolling of a facility, and is aimed at inducing those who approach the location of the picketing to take some sympathetic action such as to decide not to enter the facility involved. It is such patrolling and picketing which pro-

voke people to respond without inquiring into the ideas being disseminated and which distinguishes picketing from handbilling and other forms of communication. Picketing, a form of conduct which "may induce action of one kind or another irrespective of the nature of the ideas which are being disseminated" is "more than free speech" since it induces or encourages employees, and restrains or coerces employers within the meaning of the statute. *Bakery & Pastry Drivers & Helpers Local 802, IBT v. Wohl*, 315 U.S. 769, 776 (1942). The Supreme Court has said that "[t]he prohibition of inducement or encouragement of secondary pressure by Section 8(b)(4)(i) carries no unconstitutional abridgment of free speech." In addition, "the words 'induce or encourage' are broad enough to include in them every form of influence and persuasion." *Electrical Workers Local 501 v. NLRB*, 341 U.S. 694, 701 (1951).

As the Supreme Court stated in *DeBartolo II*, "picketing 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.' Handbills containing the same message . . . are 'much less effective than labor picketing' because they 'depend entirely on the persuasive force of the idea.'" 485 U.S. at 580, quoting from the concurring opinion in *NLRB v. Retail Store Employees*, 447 U.S. 607, 619 (1980).

The First Amendment does not protect confrontational conduct such as picketing. *Cox v. State of Louisiana*, 379 U.S. 536, 555 (1965), where the Court stated: "We emphatically reject the notion that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." Accordingly, the Court has "consistently rejected the claim that secondary picketing by labor unions in violation of Section 8(b)(4) is protected activity under the First Amendment." *Longshoremen Assn v. Allied International, Inc.*, 456 U.S. 212, 226 (1982).

An element of confrontation is needed for conduct to be coercive within the meaning of Section 8(b)(4)(B). *Chicago Typographical Union No. 16 (Alden Press)*, 151 NLRB 1666, 1669 (1965). Here, of course, no actual, traditional picketing took place. The Union's agents did not patrol carrying a typical picket sign. Nor did they hold in place any sign or banner expressing the nature of the dispute, although the rat did bear a sign on its body saying "Concrete Structures."

The "important" feature of picketing is the posting of individuals at entrances to a place of work. *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 743 (1993); *Lumber & Sawmill Workers Local 2797 (Stoltz Land & Lumber Co.)*, 156 NLRB 388, 394 (1965); *Laborers Local 389 (Calcon Construction)*, 287 NLRB 570, 573 (1987); *Mine Workers District 2 (Jeddo Coal Co.)*, 334 NLRB 677, 687 (2001).

"Picket signs or placards, while serving as indicia of picketing, are in no sense essential elements for a finding that picketing occurred." *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 72 (1991), where a large number of individuals gathered to protest a hotel's registration of strike replacements. Picketing has also been found, without the presence of picket

signs, in the totality of a union's actions which included a person dressed as a rat who disrupted traffic, parading, chanting, handbilling, a publicly performed skit and question and answer session, balloons and banners criticizing the neutral employer, and a massed rally. *K Mart Corp.*, 313 NLRB 50, 53 (1993). See *We're Associates, Inc.*, 329 NLRB 140, 143 (1999).

Indeed, a violation of Section 8(b)(4)(ii)(B) has also been found in the absence of picketing. *Carpenters (Society Hill Towers Owners Assn.)*, 335 NLRB 814, 826–828 (2001), where a union used loud amplified broadcasts aimed at tenants of a building. See also *Service & Maintenance Employees Union No. 399 (William J. Burns International Detective Agency)*, 136 NLRB 431, 437 (1962).

In determining whether a union is engaged in lawful *DeBartholomeo II* handbilling or in unlawful picketing, the Board considers whether, under the totality of the circumstances, a union is using confrontational conduct, rather than speech, to induce a sympathetic response. The question is whether the Respondent's conduct justifies a finding that it was not merely engaged in communicating the information set forth in its handbills, but was actually seeking in displaying the rat and distributing its handbills to convey a "signal" to induce those confronted by its agents to take the kind of action which traditional picket lines are expected to provoke. *Teamsters Local 688 (Levitz Furniture Co.)*, 205 NLRB 1131, 1133 (1973); *Operating Engineers Local 12 (Hensel Phelps)*, 284 NLRB 246, 248 fn. 3 (1987).

Based on the above, I reject the Respondent's arguments that no violation may be found because no picketing or signal picketing occurred, or that signal picketing may be found *only* where the union's activity, including handbilling, is a continuation of traditional picketing which had previously been engaged in. See *Ironworkers Local 29 (Hoffman Construction Co.)*, 292 NLRB 562 (1989); *Mine Workers Local 1329 (Alpine Construction Co.)*, 276 NLRB 415, 431 (1985), cited by the Respondent.

I believe that the evidence warrants a finding that the Respondent's actions "would reasonably be understood by the employees as a signal or request to engage in a work stoppage." *Teamsters Local 122 (August A. Busch & Co.)*, 334 NLRB 1190, 1191 (2001).

The Union's use of the rat constituted confrontational conduct intended to persuade third persons not to do business with Concrete. A rat is a well-known symbol of a labor dispute and is a signal to third persons that there is an invisible picket line they should not cross. The Board has noted that the term "rat" means to "go nonunion." *Marquis Elevator Co.*, 217 NLRB 461 fn. 2 (1975). A "rat" is a synonym for the word "scab," which has been defined as a strike replacement, or someone who refuses to join a union. *Occidental Chemical Corp.*, 294 NLRB 623, 636 fn. 24 (1989); *Marquis Elevator Co.*, 217 NLRB 461 (1975).

In view of the Board's remand order that evidence should be received regarding whether, in the construction industry, the rat is commonly understood to communicate the same message as actual picketing, a summary of such evidence, set forth in detail above, is appropriate here. Concrete's president Magalhaes, The Ranches' official, Antonucci, and nonparty construction company officials Loturco, Panzner, Sutherland, and Wenger

all testified that, based on their extensive experience in the construction industry, the presence of the rat is synonymous with, and has the same effect as a union picket line. They stated that the rat sent a message that there was a "labor problem," a "labor dispute," or a "nonunion" company was being targeted by a union. In addition, employees Andrews and Dauman testified that the rat represents a picket line. As set forth above, Antonucci's letters to Magalhaes mentioned that the Respondent was picketing, which represented his interpretation of the presence of the rat.

Indeed, Respondent's official Silva and the Respondent's other witnesses testified that the rat meant that a "union is involved," and that there is a "problem" or a "labor issue" at the site, including that an irresponsible contractor, who is sometimes nonunion, and is termed a "rat contractor" is working. In this regard, the rat is immediately recognizable as a traditional union picket protesting the presence of the targeted contractor, and as such calls for the viewer to refuse to enter the area where the rat is stationed.

The enormous size of the rats used here, 15 feet at Mills Pond, and 30 feet at Harborview and The Ranches, representing and emphasizing as they did, the Respondent's labor dispute, accentuated the confrontational nature of its conduct. The rat highlighted the Respondent's objectives to a greater degree than the handbill's message. Although a person approaching the jobsite may choose to ignore the message in the handbill by not accepting it, he could not avoid seeing the gigantic rat in his path. The Respondent's display of the rat near the entrance to the worksites was the functional equivalent of picketing—it sent a signal to those who approached the entrance that a labor dispute was occurring and that action on their part was desired. Neutral employees could assume that a picket line existed because of the enormous rat accompanied by the Respondent's handbilling agents, and could be expected to refuse to enter the site or make deliveries.

Inducement is shown in that the rat and handbilling began each day at The Ranches at 7:30 a.m., when the construction trades arrived. The fact that the Respondent may have remained at the site until late in the day after the trades had departed in order to handbill residents and prospective owners is of no moment. If the Respondent's purpose in erecting the rat was the inducement and encouragement of employees, that purpose came within the purview of Section 8(b)(4)(i) of the Act.

In addition, there was evidence that employees did not work and deliveries were not made at The Ranches. Thus, I credit the testimony of The Ranches' official, Antonucci, that on October 29, 1 day after the rat and handbillers appeared, the employees of three subcontractors refused to enter the jobsite because there were "union problems." Following the establishment of the reserved gate on November 1, employees of two of the subcontractors resumed work, but the employees of S.A. Anderson refused to deliver materials to the site.

There was also credible evidence of patrolling at all three jobsites. Concrete's president, Magalhaes, testified that the Union's representatives walked back and forth near the rat while giving handbills to those approaching the Mills Pond, Harborview and The Ranches worksites. In addition, Antonucci testified that on occasion the Union's agents walked back and

forth across the entrance. Further, employee Dauman testified that, although he did not see the agents walk back and forth across the entrance, they “formed” in the entrance, apparently blocking it momentarily, and then separated to permit cars to pass. He added that they looked at his vehicle’s license plate and then made a phone call as he entered the site. Such conduct, in itself would clearly satisfy the confrontational element required for picketing.

The Respondent’s witnesses drew a careful distinction between picketing, which has as its intended effect the stoppage of work and deliveries, and handbilling with a rat, which is intended to communicate various messages to the public but is not intended to interfere with work or deliveries. Although the Respondent is acutely aware of the difference between the two demonstrations, the intended audience may not be. Thus, even according to Silva’s testimony, the “nonunion sector” would believe that a rat is “just a straight picket line.”

Under these circumstances, I cannot find, as urged by the Respondent, that the rat was utilized to draw attention to its handbills, or simply to convey information to the public. The fact that the rat was also used in social or political protest situations and to support certain legislation is irrelevant to this inquiry. The use of the rat in those contexts is not proscribed by the Act. I find that its use here is proscribed.

A violation of 8(b)(4)(i) necessarily constitutes a violation of 8(b)(4)(ii)(B). *Food & Commercial Workers Local 1776 (Carpenter’s Health & Welfare Fund)*, 334 NLRB 507, 509 fn. 8 (2001). In addition, the October 30 letter of Silva to The Ranches provides proof of a secondary object. In the letter, Silva asked that the project be awarded to a “responsible” contractor. He testified that he did not regard Concrete to be a responsible contractor, and admitted that the purpose of the letter was, in part, to have Concrete sign a contract with the Union. In this connection, Respondent’s witness Speziale testified that an irresponsible contractor is one that is nonunion. In order to comply with the Respondent’s request that it use a responsible contractor, The Ranches would have to sever its relationship with any bidder or contractor the Union deemed irresponsible. Inasmuch as the Respondent believes that Concrete is irresponsible, it follows that its object was to force The Ranches to cease doing business with Concrete.

Although not necessary to the ultimate conclusion in this case, in the interest of completion I will address the *Moore Dry Dock* issue raised by the complaint. *Sailors’ Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950). The General Counsel alleges that the Respondent engaged in improper common situs picketing at The Ranches by picketing at gate 2, the main entrance gate reserved for users other than Concrete and its suppliers and visitors. The Respondent asserts, and the evidence supports a finding, that there was a breach of the reserved gate system. Thus, Ranches’ official, Antonucci, testified that all the contractors’ employees used gate 2, and that Triangle Building’s driver used gate 1, the gate reserved for Concrete’s suppliers, since its driver did not want to enter gate 2, where the rat was situated. In view of that testimony, I credit Silva’s testimony that he observed Concrete’s trucks using gate 2.

Accordingly, the evidence supports a finding that the reserved gate system was tainted by the use of the main gate 2 by all subcontractors including Concrete. *Electrical Workers Local 323 (J. F. Hoff Electric Co.)*, 241 NLRB 694 (1979). However, despite the taint of the neutral gate, there is ample evidence in this case, as set forth above, to find that the Respondent’s display of the rat and handbilling at that entrance had a secondary objective. Thus, although the Respondent may have engaged in proper *Moore Dry Dock* picketing, a violation may still be found if other evidence exists of a prohibited object. *Electrical Workers Local 369 (Garst-Receverur Construction Co.)*, 229 NLRB 68 (1977).

The Respondent argues that this case is similar to those in which banners were displayed with a message. In those cases, the unions displayed large banners at the entrances of neutral employers, accompanied by handbilling, but no patrolling or picketing. The banners were held stationary by union agents with the message “SHAME ON” [the name of the secondary employer] and also say “Labor Dispute.” The handbills request the recipient to ask the named business to contact the primary employer and ask it to stop its illegal conduct. The courts that considered this issue in a 10(l) context, relying on *DeBartolo II*, decided that the banners, unaccompanied by any threats, picketing, or other coercive behavior, did not warrant injunctive relief. *Benson v. Carpenters Local 184*, 337 F.Supp.2d 1275 (D. Utah 2004); *Kohn v. Southwest Regional Council of Carpenters Local 209*, 289 F.Supp.2d 1155 (C.D. Cal 2003). In those cases, the unions engaged in no non-speech conduct. *DeBartolo II* permits a union to affect the business operations of neutral employers as long as it does so only with speech—without picketing, patrolling or violence. The union’s pure speech conduct did not violate Section 8(b)(4)(ii)(B). Where a union’s demonstration is limited to the display of signage and the distribution of handbills, there is no evidence of any nonspeech conduct in the form of patrolling, confrontation or violence.

Unlike the facts here, in those cases, the unions did not engage in any conduct which would cause the banners to be considered picketing. The unions’ actions there did not involve confrontation between union agents and employees, customers or employer agents since the unions’ agents were passive. They simply held the banners and did not move. Nor were the banners accompanied by patrolling or other nonspeech activity which could be considered confrontational.

In conclusion, I find that the Respondent’s actions at The Ranches, as set forth above, violated Section 8(b)(4)(i) and (ii)(B) of the Act.

Section 8(b)(7)(C)

Section 8(b)(7) states: It shall be an unfair labor practice for a labor organization or its agents—

To picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective-bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing. . . . *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Section 8(b)(7) places limitations on “picketing for an object of ‘recognition or bargaining’ . . . or for an object of organization for more than a reasonable time. Picketing for other purposes is not proscribed by this Section.” *Laborers Local 840 (C.A. Blinne Construction Co.)*, 135 NLRB 1153, 1156 (1962). Thus, picketing to protest Concrete’s alleged poor work would not violate Section 8(b)(7). But if either recognition or organization is found to be “an” object, not necessarily the sole object of the picketing, Section 8(b)(7) prohibits it. *Plumbers Local 32 (Bayley Construction)*, 315 NLRB 786 (1994). The fact that the Respondent has used the rat in other, political or community protest demonstrations, has no bearing on the inquiry here. The Act does not proscribe its use in those contexts. If the Respondent’s actions here, including the use of the rat contravenes Section 8(b)(7), such activity must be found to be unlawful.

A recognitional objective is clearly shown in the Respondent’s demand for recognition made to Concrete’s president, Magalhaes, immediately preceding, and during the erection of the rat, *Electrical Workers Local 265 (RP & M Electric)*, 236 NLRB 1333 (1978), and its tender of a contract to him. *Operating Engineers Local 101 (St. Louis Bridge)*, 297 NLRB 485, 491 (1989). *Retail Clerks Local 899 (State-Mart, Inc.)*, 166 NLRB 818 (1967).

The Respondent clearly had a recognitional objective in its display of the rat at all three jobsites. Prior to and during the erection of the rat at Mills Pond, Silva asked Magalhaes to sign a contract with Local 66, and while the rat was displayed, tendered to him a sample agreement. In addition, while the rat was displayed at The Ranches, Silva asked Magalhaes to sign a contract with Local 66. Further, Silva admitted that the Respondent’s purpose in erecting the rat at all three sites was to persuade Concrete to sign a contract, and conceded that the Respondent sought to represent the employees of Concrete. Indeed, the Respondent removed the rat at The Ranches during a one week period within which Magalhaes was to consider signing the contract tendered by it. When he refused to sign it, the rat was immediately reinstalled at the jobsite.

Based on my findings, above, that the Union’s conduct constituted picketing, and that such picketing was done with a recognitional object, the only question remaining is whether the Respondent picketed without a petition being filed within a reasonable period of time.

The Respondent did not file a petition, and the statute does not define the term “reasonable period of time,” but the Board

has found that the 30-day limitation is an “outside limitation.” *RWDSU, District 65 (Eastern Camera & Photo Corp.)*, 141 NLRB 991, 999 (1963). The Board has held that picketing for less than 30 days can be of unreasonable duration and a violation in the union’s “constancy” of its recognitional demand when it picketed intermittently for only nine days during an eight week period. *Operating Engineers Local 4 (Seaward Construction Co.)*, 193 NLRB 632 (1971). A violation has also been found where mass picketing accompanied by violence took place for less than 30 days. *Operating Engineers Local 101 (St. Louis Bridge Construction Co.)*, 297 NLRB 485 (1989), and where there is intermittent picketing for periods of less than 30 days for more than 1 year. *Electrical Workers Local 113 (I.C.G. Electric)*, 142 NLRB 1418, 1422 (1963).

I find that here, through its activities including the erection of the rat and handbilling, the Respondent picketed at Mills Pond for 14 days, at Harborview for 2 days, and at The Ranches from October 28 through November 6, and then for 12 days, from November 13 through 15. Accordingly, the Respondent picketed for a total of 28 days during a period of 4 months, from July to November 2002. Silva asked Magalhaes to sign a contract in July and in November, thus demonstrating that the Respondent’s recognitional object continued during the entire time that the rat and handbilling activities occurred.

Under these circumstances, especially inasmuch as the statute provides that the picketing may not be conducted without a petition being filed for a reasonable period of time not to exceed 30 days, I find that the Respondent’s picketing for 28 days during a 4-month period continued for an unreasonable period of time. I accordingly find that its picketing violated Section 8(b)(7)(C) of the Act.

CONCLUSIONS OF LAW

1. By picketing at The Ranches in Mt. Sinai, New York, from Ranches from October 28 through November 6, 2002, and from November 13 through 15, with an object of forcing The Ranches to cease doing business with Concrete Structures, Inc., the Respondent violated Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the Act.

2. By picketing at the Mills Pond Elementary School in Smithtown, New York, the Harborview Townhouses in Roslyn, New York, and at The Ranches in Mt. Sinai, New York for a recognitional object for more than a reasonable period of time, the Respondent violated Section 8(b)(7)(C) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Laborers' Eastern Region Organizing Fund, Monroe Township, New Jersey, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Inducing or encouraging, by picketing, any individual employed by The Ranches, or any other person engaged in commerce, or in an industry affecting commerce, to engage in a strike or a refusal in the course of his or her employment to perform services where an object thereof is to force The Ranches, or any other person, to cease doing business with Concrete Structures, Inc.

(b) Threatening, coercing or restraining, by picketing, The Ranches, or any other person engaged in commerce, or in an industry affecting commerce, where an object thereof is to force The Ranches, or any other person, to cease doing business with Concrete Structures, Inc.

(c) Picketing, or causing to be picketed, Mills Pond Elementary School, Smithtown, New York, the Harborview Townhouses, Roslyn, New York, and The Ranches, Mt. Sinai, New York, where an object of such picketing is forcing or requiring Concrete Structures, Inc. to recognize or bargain with the Respondent as the collective-bargaining representative of the employees of Concrete Structures, Inc., at a time when the Respondent is not certified as such representative and where such picketing has been conducted without a petition under Section 9(c) of the Act being filed within a reasonable period of time not to exceed 30 days from the start of such picketing.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its union office in Monroe Township, New Jersey, copies of the attached notice marked "Appendix A."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix A, at its own expense, to all of its members. The notice shall be mailed to the last known address of each member after being signed by the Respondent's authorized representative.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Mills Pond Elementary School,

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Smithtown, New York, the Harborview Townhouses, Roslyn, New York, and The Ranches, Mt. Sinai, New York, if willing, at all places where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX A

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT induce or encourage, by picketing, any individual employed by The Ranches, or any other person engaged in commerce, or in an industry affecting commerce, to engage in a strike or a refusal in the course of his or her employment to perform services where an object thereof is to force The Ranches, or any other person, to cease doing business with Concrete Structures, Inc.

WE WILL NOT threaten, coerce or restrain, by picketing, The Ranches, or any other person engaged in commerce, or in an industry affecting commerce, where an object thereof is to force The Ranches, or any other person, to cease doing business with Concrete Structures, Inc.

WE WILL NOT picket, or cause to be picketed, Mills Pond Elementary School, Smithtown, New York, the Harborview Townhouses, Roslyn, New York, or The Ranches, Mt. Sinai, New York, where an object of such picketing is forcing or requiring Concrete Structures, Inc. to recognize or bargain with us as the collective-bargaining representative of the employees of Concrete Structures, Inc., at a time when we are not certified as such representative and where such picketing has been conducted without a petition under Section 9(c) of the Act being filed within a reasonable period of time not to exceed 30 days from the start of such picketing.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

LABORERS' EASTERN REGION ORGANIZING FUND