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Scabby the Rat Has Been Legitimized by the NLRB

Labor Relations Update Blog on **July 23, 2021**

A split Board concluded this week that a union did not engage in unlawful secondary activity under the NLRA when it stationed a 12-foot-tall inflatable rat—known all too well by employers as "Scabby the Rat"—and two 8-foot banners on the worksite of a neutral employer for the purpose of forcing the neutral employer to cease doing business with the primary employer with whom the union had a labor dispute. *International Union of Operating Engineers, Local Union No. 150 (Lippert Components, Inc.)*, 371 NLRB No. 8 (July 21, 2021).

The Board's decision lays to rest former General Counsel Peter Robb's attempt to bring renewed scrutiny to the use of the inflatable rat and other forms of "bannering" against neutral employers as a form of secondary activity that Congress intended to prohibit under Section 8(b)(4) of the Act.

ALJ's Finding of No Unlawful Secondary Activity

As we previously reported here, the underlying unfair labor practice charge was heard by an Administrative Law Judge (ALJ) in 2019. At issue in the unfair labor practice complaint was whether the union violated the Act when it set up an inflatable rat and two 8-foot banners, manned by two union representatives, at the entrance of a trade show that targeted a neutral employer that did business with the primary employer with whom the union had an ongoing labor dispute.

The ALJ applied Board precedent, developed just a decade earlier, in *Eliason & Knuth of Arizona* and *Brandon Regional Medical Center*, which found, respectively, that the use of stationary banners or an inflatable rat at the site of a neutral employer without more did not "threaten, coerce, or restrain" the neutral employer in violation of Section 8(b)(4) of the Act. Constrained by this precedent, the ALJ dismissed the complaint, finding that the union's stationary display did not amount to unlawful picketing or coercive non-picketing conduct under the NLRA.

Request for Board Review and Legal Analysis

Following the ALJ's decision, the Office of the General Counsel of the NLRB requested, in October 2020, that the Board overrule its prior decisions on such conduct, arguing that Board precedent unnecessarily narrowed the definition of picketing and coercive conduct falling within the scope of Section 8(b)(4)'s prohibition. The Board subsequently invited the parties and interested amici to submit briefs on the question of whether the Board should overrule *Eliason & Knuth* and *Brandon Regional Medical Center* and, thereby, reverse its position on the use of inflatable rats and stationary banners.

After reviewing the ALJ's decision and the 30 briefs submitted in the case by the parties and by amici, a majority of the Board affirmed the ALJ's decision and dismissed the Section 8(b)(4) complaint. The majority opinions agreed that the doctrine of constitutional avoidance required dismissal of the complaint. Thus, even where the Act *could* be interpreted such that banners and inflatable rats constitute the type of coercive secondary conduct prohibited by the Act, the question is whether the Act *must* be read in this way when it raises serious First Amendment issues.

The majority concluded that where the conduct at issue was clearly expressive activity intended to persuade the neutral employer's customers, the possible infringement on the union's First Amendment rights precluded the Board from finding that the banners and inflatable rat violated the Act. Moreover, the Board held that neither the union's display nor the large, imposing presence of Scabby the Rat mandated a finding of intimidation or coercion within the meaning of Section 8(b)(4).

Takeaways

For the foreseeable future, the Board's decision has blessed unions' use of Scabby and banners as a lawful application of secondary pressure on neutral employers. In his dissent, Member Emanuel warned that unions would exploit the "gaping secondary hole" left by the majority's failure to recognize the wide range of coercive union secondary conduct. Whether this ominous warning will bear out remains to be seen. With the upcoming changes to the composition of the NLRB—President Biden's two Board appointees are well into the confirmation process and could give Democrats control of the Board by the end of August—it is likely that unions will resort to using Scabby more often.

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