

Scabby Survives Another Trip to the NLRB: Board Reaffirms Rat-and-Banner Displays Targeting Neutral Businesses Are Permissible

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On July 21, 2021, the National Labor Relations Board (“NLRB” or the “Board”) issued a [3-1 decision](#) affirming its precedent that displaying banners and a large inflatable rat (“Scabby the Rat”) near neutral employers does not violate the National Labor Relations Act (“NLRA” or “the Act”). This decision may come as a disappointment to many employers as the NLRB under the Trump administration had been making efforts to end what many felt was unlawful secondary picketing under the Act.

Scabby’s Prior History at the Board

At issue in this case is Section 8(b)(4)(ii)(B) of the Act, which makes it “‘an unfair labor practice for a labor organization ... to threaten, coerce, or restrain’ a person not party to a labor dispute ‘where ... an object thereof is ... forcing or requiring [him] to ... cease doing business with any other person.’” For decades, unions have displayed “Scabby the Rat,” an oversized inflatable rat with red eyes, in close proximity to businesses to protest alleged unfair labor practices by employers and to persuade workers not to work for or patronize an employer whose labor practices are being challenged. Employers have long detested Scabby’s presence near their property. During the Obama administration, the NLRB issued a pair of decisions relating to secondary picketing, finding that:

- Stationary bannering in front of a neutral employer was not unlawful picketing because it did not block the entrance to a neutral business nor did it involve the carrying of picket signs or persistent patrolling.
- Large, inflatable rat balloons can be permissible when they are set up a sufficient distance from the business’s front door, finding them neither picketing nor coercive.

Under the Trump administration, the NLRB’s General Counsel’s Office publicly crusaded against Scabby, highlighting the inherently coercive nature of his presence near a business. In 2019, the

General Counsel's Division of Advice published [an advice memo](#) arguing that a union's use of Scabby the Rat (and his occasional friend "Fat Cat") was unlawful secondary picketing. In connection with a prior proceeding, the Division also recommended that the NLRB issue a complaint against a union, pressing the NLRB to overturn its Obama-era precedents. However, that case was settled before a decision was reached so the NLRB did not have a chance to act.

Majority of NLRB Refuses to Change Obama-Era Precedent

This most recent case, International Union of Operating Engineers, Local Union No. 150, National Labor Relations Board, No. 25-CC-228342, arose out of a union's display of a 12-foot-tall inflatable Scabby the Rat as well as two 8-by-3.75-foot banners near the entrance to a trade show hosted by a neutral business who used components manufactured by the business with whom the union had a labor dispute.

A bipartisan majority agreed that the case should be dismissed. Chair Lauren McFerran, the lone Democrat on the Board, wrote that this outcome was mandated by the board's Obama-era precedents. Two Republican members John Ring and Marvin Kaplan agreed the case should be dismissed on constitutional grounds, but opined that the Board's precedents improperly narrowed the NLRA's protections of neutral businesses against coercion. Republican William Emanuel was the sole dissent. Emanuel wrote that the Board's precedent was incorrect, finding that the presence of Scabby "plainly created a symbolic confrontation" and should not be permitted under the Act secondary picketing provisions. Importantly, Emanuel's term expires in August.

Key Takeaways

As we wrote [previously](#), employers should expect continued volatility from the NLRB. The Board's prosecutorial priorities and guidance have significantly changed under the Biden administration. Employers can likely expect that change to progress further once two new Democratic Board Members are confirmed, thereby shifting the balance of power on the Board. Unfortunately for employers, that means Scabby will likely continue to patrol non-union businesses.

We will continue to monitor developments in this area and provide updates when relevant.

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