Published on *The National Law Review* https://www.natlawreview.com

Scabby the Rat, Coming to a Business Near You? It's Possible

Article By:

Rebekah K. Herman

Ronald Meisburg

Scabby the Rat is a familiar sight in disputes between unions and employers. Scabby, a giant inflatable rat with red eyes, fangs, and claws, is often placed outside the places of business of employers with whom a union has a labor dispute (the "primary" employer). Recently, the NLRB again addressed the issue of whether such union protests can be directed against a "secondary" neutral employer who does business with the primary employer but who is not party to the underlying labor dispute.

Background

Generally speaking, federal labor policy seeks to protect the right of unions to exert pressure on a primary employer, but shields secondary employers from such pressure. For that reason, Section 8(b)(4) of the NLRA makes it illegal for a union to "threaten, coerce or restrain" a secondary employer as a means of putting pressure on the primary employer by, *e.g.*, interfering with the business relationship between the two employers.

In *International Union of Operating Engineers, Local Union 150 (Lippert Components, Inc.)*, 371 NLRB No. 8 (2021), the NLRB revisited the question whether a union's display of Scabby the Rat and banners near the entrance or location of a neutral secondary employer, in and of itself was an effort to "threaten, coerce or restrain" the secondary employer in violation of the Section 8(b)(4).

The *Lippert Components* Decision

In *Lippert Components*, the NLRB ruled 3-1 that displaying a 12-foot tall Scabby the Rat as well as two 8-by-3.75 feet banners outside of a trade show attended by a neutral employer was permissible under the NLRA. The neutral, Lippert Components, did business with MacAllister Machinery, with whom the union had a primary labor dispute. The Union's objective was to force Lippert to cease doing business with MacAllister. The rat and banners were positioned near the public entrance to the trade show for four days during business hours with two union representatives posted next to the display at all times. The banners read "OSHA Found Safety Violations Against MacAllister Machinery, Inc." and "SHAME ON LIPPERT COMPONENTS, INC. FOR HARBORING RAT

CONTRACTORS."

Previous Board precedent had upheld the legality of a union's display of large banners targeting neutral parties. However, the issue was placed before the Board again in a complaint issued by the previous NLRB General Counsel, in an effort to narrow existing law and broaden secondary boycott protection of neutral employers. The Board invited interested third-parties to submit *amicus* briefs in the *Lippert* case to address whether the Board should adhere to, modify, or overrule its prior precedent.

On July 21, 2021, after considering the 30 briefs submitted in *Lippert* and the decision and evidence in the proceedings below, the Board reaffirmed its prior precedent and held that displaying banners or an inflatable rat near the entrance of a neutral employer, without more, does not violate the NLRA.

The three members of the majority issued the decision plus two concurring opinions (one by Chairman McFerran and another by Members Ring and Kaplan). Member Emanuel dissented. Although the majority opinions relied on slightly different reasoning, they all agreed that the conduct at issue did not violate the NLRA.

Chairman McFerran Concurrence

Chairman McFerran found that the Board's prior precedent was directly on point and that under the Board's prior decisions, the conduct at issue did not violate the NLRA. She also agreed with her concurring colleagues conclusion that "under the constitutional avoidance doctrine, the potential infringement of a union's First Amendment rights preclude[d] the Board from finding that the banners and inflatable rat" violated the NLRA. Slip op. at 2.

Members Ring & Kaplan Concurrence

Members Ring and Kaplan concurred in the holding that the rat and banners did not violate the NLRA but undertook a deeper examination of constitutional decisions by the U.S. Supreme Court. Ring and Kaplan recognized the importance of protecting neutral employers from being enmeshed in labor disputes not their own, but held that the line between constitutionally protected persuasion and expressive activity and prohibited secondary threats and coercion was not crossed in this case. They found the display of the rat and banners to be protected expressive activity rather than prohibited coercion. Relying on Supreme Court cases finding flag burning, cross burning, and anti-gay demonstrations to be protected by the First Amendment, Ring and Kaplan concluded, "[s]urely, if the First Amendment protects this conduct, prohibiting an inflatable rat and stationary banners shaming a secondary employer would raise significant constitutional concerns in the eyes of the [Supreme] Court." Slip op. at 6. Under the constitutional avoidance doctrine, even if the NLRA could be interpreted to prohibit such conduct, such a construction was not compelled and would raise constitutional concerns. Thus, Ring and Kaplan concluded that the conduct was lawful under the NLRA.

They also noted that while they agreed with results in prior NLRB precedent upholding union displays at neutral employers' worksites, they did not agree with the reasoning of those decisions "to the extent that they attach decisive significance to whether disputed union conduct as the same attributes as 'traditional picketing' or, if not, whether it disrupts the neutral employer's operations." Thus, Ring and Kaplan left open the possibility that under different circumstances or facts, certain similar tactics targeting neutral employers might violate the NLRA.

Member Emanuel Dissent

Member Emanuel dissented expressing his view that the Union's conduct constituted coercive picketing or coercion in violation of the NLRA. Emanuel reasoned that the Union's conduct was the functional equivalent of picketing in that the "Union's goal was to evoke a picket line – but evade the proscriptions of [the NLRA] – by requiring people to pass their union sentries, banners, and giant inflatable rat in order to do business with the neutral employer Lippert." Slip op. at 9. Because the Supreme Court has long held that secondary picketing is not protected by the First Amendment, Emanuel concluded that prohibiting the Union's conduct also should not raise First Amendment concerns. Member Emanuel warned that the majority's decision invited a dramatic increase in secondary boycott activity which would result in petitions for relief from neutral employers.

Takeaways

- The use of Scabby the Rat, similar inflatables, and banners is permissible activity during labor protests at the primary employer's site, secondary employer sites, and other event locations.
- The divided decision of the Board does not give any bright-line guidance for future cases in which such displays might cross the line into conduct that violates Section 8(b)(4) and does not constitute protected speech under the Constitution.
- Employers can expect continued, and perhaps increased, use of similar demonstrations featuring Scabby the Rat and bannering directed at neutral employers.

National Law Review, Volumess XI, Number 209

Source URL:https://www.natlawreview.com/article/scabby-rat-coming-to-business-near-you-it-s-possible