# “Scabby” the Rat Gets Stay of Execution

## Labor & Employment Law Update

By Michael Hughes on July 22, 2021


The National Labor Relations Board (NLRB) ruled 3-1 on July 21, 2021 that labor unions may continue to use large, inflatable balloons–usually in the shape of an ugly rat–to aid in publicity of labor disputes, whether connected with traditional picketing activity or without. The inflatable rat balloon used by the International Union of Operating Engineers, Local 150 has been nicknamed “Scabby.” Scabby was the subject of the NLRB’s ruling. In that case, Local 150 erected Scabby and banners at the entrance to the parking lot at an RV tradeshow. The rat and signage identified the company that the union had its primary dispute with (the “primary employer”), but also named Lippert Components, Inc., a customer of the primary employer, stating “Shame on Lippert Components, Inc. for Harboring Rat Contractors.” Lippert is a major supplier to the RV industry. All attendees of the tradeshow had to drive past Scabby, the banners, and two seated, stationary union members to enter the parking area.

For many years, labor unions have utilized Scabby, and other inflatable creatures such as a “fat cat,” on their picket lines and other demonstrations. Such use has become ubiquitous at construction site pickets lines. Employers, businesses and the former General Counsel of the NLRB, Peter Robb, sought to execute Scabby in instances, like as used against Lippert Components, where the union employed the rat against “secondary” or “neutral” employers—i.e., employers with whom the union does not have an actual labor dispute. Ever more frequently, unions have utilized such inflatables against neutral employers in an effort to pressure those neutral employers to stop doing business with the company with whom the union has an actual dispute.

It is a violation of the National Labor Relations Act (NLRA), as an unfair labor practice, for a union to “picket” against a secondary or neutral employer. Traditional picketing activity, by its nature, necessarily contains a confrontational or coercive element. Employers and the NLRB GC argued that, even without any other traditional picketing activity, the use of Scabby, by itself, was similarly confrontational and coercive. Accordingly, they argued, the use of Scabby or

other such inflatables, should be considered unlawfully coercive when deployed against businesses and employers with whom the union does not have a dispute.

The NLRB disagreed. It upheld the ruling of the administrative law judge that found that the use of inflatables are not unlawfully confrontational or coercive of the neutral business. Unions are allowed to attempt to persuade (but not coerce) neutral employers to stop doing business with the company the union is targeting. Without threats, coercion or actual picketing, the NLRB found, that the union did not violate the law by using Scabby. Moreover, as public "speech," Scabby enjoys protection under the First Amendment to the US Constitution.

Finally, while it is also an unfair labor practice for a union to even persuade or request employees of a neutral employer to withhold their labor from a neutral employer (i.e., refuse to work), the NLRB found that the use of Scabby, by itself, is not a "signal" for neutral employees to refuse to work and, in any event, in the case before it, no such work stoppages ever occurred. In their concurring opinion, two members of the Board majority cautioned, however, that each case will need to be viewed on its own facts to determine whether the union's conduct and activities amounts to unlawful threats or coercion, even without the use of traditional picketing—and noted, approvingly, of a recent case where the union's use of a loudspeaker at a "coercively loud volume at a secondary employer's worksite" was found to be unlawful.

**Takeaways**:

Because the case presented some clear implications of the First Amendment, a bipartisan panel of the NLRB (two republicans and one democrat) formed the majority. In the wake of the ruling, we can expect that the use of inflatables, banners, signage and leafletting may become even more common against secondary or neutral employers. These neutral employers may include customers and suppliers of the company with which the union has a dispute. They may also include general contractors and property owners that subcontract with non-union trades. While the NLRB's ruling merely keeps what had been the *status quo*, it may be seen as a "green light" for other unions to take up these tactics—and for unions to go even further in activities aimed at influencing neutral employers to cut ties with companies the union ultimately is targeting. There are certain ways to limit the type of activity the unions may engage in, and/or to limit the time and place of such activities, especially at construction sites. If you are the target of such secondary activity, you should contact your competent labor counsel to determine if the union's actions are lawful or unlawful in the circumstances, how to limit the impact of the union's actions, and whether an unfair labor practice can be filed against the union.