LABOR LAW

# Trump NLRB poised to exterminate Scabby the Rat

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*The National Labor Relations Act (NLRA) has special provisions that limit the pressure tactics a union can use in trying to force an employer to recognize the union. One of the major limitations is a prohibition against unions attacking companies that are uninvolved in the labor dispute and don't have a dog in the hunt.*

*Prior incarnations of the National Labor Relations Board (NLRB) have decided that a union's deployment of large inflatable rats and banners against noninvolved "secondary" employers usually doesn't run afoul of this prohibition. These well-worn but still-catchy union tactics are intended to make members of the public think twice before patronizing the secondary employer and thereby pressure it to drop the primary employer. Recently, however, the Trump NLRB has made a move—precipitated by a motion from its conservative General Counsel—suggesting that a change is in the wind, at least until the Trump NLRB loses its majority.*

## Background

While unions under the NLRA generally have a right to engage in a broad range of concerted activities, the rules are more circumscribed and limited when unions seek to represent workers at nonunion employers. The key statutory provision in that context is NLRA Section 8(b)(4), which protects neutral secondary employers against union conduct aimed at coercing them—through a "secondary boycott"—to cease doing business with the primary employer.

Picketing, threats, coercion, and restraint against a secondary employer during a union's organizing drive violates Section 8(b)(4). To establish unlawful coercion, affected employers need not point to directly coercive statements (which union organizers well know how to mask). They can instead show the union indirectly induced action against them by nonverbal means and thereby sought to pressure them to cease work with the primary employer.

Nonetheless, not all pressure tactics against secondary employers are illegal. For example, unions can lawfully urge employees of secondary employers to honor picket lines around the primary employer when making deliveries (although there are limits to this, too, especially in the construction industry). Of course, all bets are off for secondary employers that are allied with the primary employer, either through corporate integration/control or by providing material support to the primary employer. Legally, picketing against non-neutral employers is no different than picketing the primary employer.

## NLRA Section 8(b)(4)

A related principle is most important in this case. Honoring free-speech precepts, NLRA Section 8(b)(4) has an important touchstone. Embedded in the final proviso of the section is a lengthy admonition: The statute cannot 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."

That language caused prior Boards to bless union deployment of rats and banners against neutral secondary employers. In the flip-flop between liberal and conservative constructions of the NLRA based on who is in the Oval Office, the current NLRB is evidently intent on reinterpreting that language before its majority dwindles.

## Triggering case and NLRB's invitation

In September 2018, International Union of Operating Engineers, Local Union No. 150, was trying to organize employees at MacAllister Machinery, Inc. Lippert Components, a manufacturer and supplier of components used in the RV industry, rented some of its heavy equipment from MacAllister but didn't employ the company's workers and didn't want to be involved in Local 150's labor dispute. Local 150, however, believed it could further its goal of recognition by pressuring Lippert to stop doing business with MacAllister.

An RV trade show run by one of Lippert's largest customers gave the union an opening. For three days at the trade show, the union displayed a 12-foot-tall inflatable rat with red eyes, fangs, and claws on public land near the entrance. The rat was accompanied by two banners that read: "OSHA Found Safety Violations Against MacAllister Machinery, Inc." and "SHAME ON LIPPERT COMPONENTS, INC., FOR HARBORING RAT CONTRACTORS." Lippert filed unfair labor practice charges, alleging violations of NLRA Section 8(b)(4).

Applying case law involving the very subject of inflatable rats, the administrative law judge (ALJ) dismissed the complaint. The NLRB's General Counsel sought review of the decision. On October 27, 2020, the NLRB issued a "Notice and Invitation to File Briefs," asking the parties to address its standards for evaluating alleged violations of Section 8(b)(4).

## Predecessor cases

The NLRB targeted two predecessor cases in its invitation: *Carpenters Local 1506 (Eliason & Knuth of Arizona),* 355 NLRB 797 (2010), and *Sheet Metal Workers Local 15 (Brandon Regional Medical Center),* 356 NLRB 1290 (2011).

In *Eliason,* the NLRB decided that when union members held large stationary banners on public property advising of a labor dispute and either declaring "shame" on

the neutral employer or expressly urging the public not to patronize it, that behavior wasn't picketing and didn't violate NLRA Section 8(b)(4).

In *Brandon,* the NLRB similarly found that deploying a 16-foot inflatable rat on public property outside a neutral employer was neither unlawful picketing nor unlawful coercive conduct.

## Discussion

The NLRB's invitation specifically asks practitioners to comment on whether *Eliason* and *Brandon* should be reversed. It noted the Board had previously held that stationary banners and similar displays (1) were permissible because they didn't entail confrontation on par with patrolling an entrance carrying picket signs and (2) weren't otherwise unlawfully coercive because they didn't directly disrupt or threaten to directly disrupt the neutral employers' operations.

Underlying those questions was the General Counsel's contention that the prior NLRB decisions wrongly narrowed the definitions of picketing and coercion, created standards that were "vague and imprecise," strayed from "the dictates of Section 8(b)(4)," and departed from "decades of Board law." The General Counsel maintained that displaying a tall inflatable rat and two large banners was "tantamount to picketing, or constituted otherwise coercive conduct, to unlawfully pressure neutral employers to cease doing business with the primary employer in the labor dispute."

In an impassioned footnote-laden dissent, NLRB member Lauren M. McFerran countered the General Counsel's contention. She pointed out that the Board's current standard—embodied in at least 12 Board decisions—was "durable and largely uncontroversial," with no federal appellate court and no district court ever casting doubt on the existing *Eliason* standard. Indeed, as she noted, a legion of NLRB cases involving banners, rats, and even an inflatable cockroach or two have all gone the same way. On those bases, in her view, this case was a no-brainer that didn't justify the majority's actions.

## First Amendment implications

More than just asserting that the majority was seeking to overturn precedent "carefully reasoned and rooted firmly in court authority," McFerran warned that restricting "noncoercive, nondisruptive use of inflatable rats and stationary banners to publicize a labor dispute . . . threatens First Amendment rights." This is an only slightly veiled prediction of constitutional litigation to come if the majority and the General Counsel follow through with their apparent plan to reject and/or modify prior case law in this area.

## Bottom line

It is hard to understand how the peaceful deployment of inflatable rats, banners, or cockroaches aimed at secondary employers from public land can be viewed as either coercive or akin to picketing around a place of business. It is equally difficult to square the NLRB and its General

Counsel's approach with First Amendment guarantees as they relate to union conduct on public land. If the NLRB follows through with its evident agenda, extensive litigation over the next few years is almost certain.

This is the second time in the past three months the Trump NLRB has sought to clamp down on union options for organizing new employees. As we have reported, the General Counsel advised all NLRB regional offices to scrutinize allegations that a union sought or received more than ministerial assistance to its organizing efforts from the employer (see "NLRB General Counsel clamps down on union organizing strategies" in our September 21, 2020, issue). Couched as efforts to protect employees' rights to freely choose collective bargaining representatives, that effort and the current invitation stem from the same design: keeping nonunion employers union-free.

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