Legal Update Article

# Why Is 'Scabby the Rat' a Legal Dilemma?

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The National Labor Relations Board (NLRB) had invited briefs on bannering and displays of "Scabby the Rat," the giant roadside inflatable rat (or other gruesome creature) used in many labor disputes. At issue is the conflicting labor law principles distinguishing between lawful publicity of a dispute and unlawful coercive conduct.

### Strikes and Picketing

The National Labor Relations Act (NLRA) protects employees' right to strike and the right to publicize that strike by peaceful picketing. However, a strike is not a prerequisite to having a picket line. Unions have the right to publicize their issues even without a strike.

Picket lines themselves have a peculiar legal pedigree. Although threatening or coercive behavior is prohibited, the law acknowledges an element of confrontation inherent in a picket line. A picket line's purpose is to discourage employees and third parties from entering the picketed establishment. The U.S. Supreme Court has held that "picketing is a mixture of conduct and communication." *DeBartolo v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568 (1988). Although the law protects the right to cross a picket line, at least a threshold of fear created is understood by the presence of a lawful picket line. The Court said that picketing, or the conduct element, is the most persuasive deterrent. Unions sometimes direct their members not to cross a picket line, even if it means avoiding doing business with a company, or refusing to perform work. Members of the public sometimes choose not to enter an establishment if it means crossing the line. Employees have the right to decide for themselves.

Employees and unions are not limited to picketing to publicize their issues. *Handbilling* also is common. Handbilling is the distribution of printed material advertising the dispute, and it is performed by a small number of participants, unlike a picket line. The Court noted in *DeBartolo* that "handbills containing the same message ... are much less effective than labor picketing because they depend entirely on the persuasive force of the idea."

There are times when picketing is not permitted. For instance, "secondary" picketing, or picketing directed at a neutral employer to coerce it to cease doing business with the company that *is* a party to the labor dispute, is unlawful. This is especially common at construction sites, where a strategic picket line can result in work or delivery stoppages against other companies, effectively forcing the target employer off the site.

### The Issue

Eventually, building trade unions developed the idea of augmenting handbilling with an inflatable rat, a large banner proclaiming their message, or both. It became apparent that the inflatable rat or banners were stand-ins for the picket line. Construction employers began noticing deliveries would not be made, trades other than the one with the complaint refused to work. The question then became: *Is the inflatable rat the functional equivalent of the picket line?* If it is unlawful to picket in a given situation, can a union handbill with an inflatable rat and cause the same disruption?

### Previous Litigation

In 2010, the Democrat-majority NLRB dismissed a case on the issue, finding nothing in the legislative history of the NLRA prohibiting the exhibition of stationary banners (there was no rat in this case). *Eliason & Knuth of Arizona*, 355 NLRB 797 (2010).

In 2019, the NLRB's General Counsel sought an injunction against a New York City construction union contending that banners and inflatable rats at the entrance of neutral businesses constitute unlawful "coercive" conduct, rather than permissible "persuasive" communication. The NLRB was unsuccessful in enjoining the use of the inflatable rat. *NLRB v. Construction & General Building Laborers Local 79*, 393 F. Supp. 3d 181 (July 1, 2019).

## NLRB Invitation

In considering a case involving a stationary rat and banners, but no picketing, the NLRB requested *friend-of-the-court* briefs to be filed by interested parties. It asked for comment as to whether it should overrule *Eliason & Knuth of Arizona* (and subsequent cases), whether there should be an expansion of non-picketing conduct deemed unlawful, and whether any potential violation of the NLRA might infringe upon the First Amendment. *International Union of Operating Engineers, Local Union No. 150* (*Lippert Components)*, 370 NLRB No. 40 (Oct. 27, 2020).

Please contact a Jackson Lewis attorney with any questions about the NLRB.