Legal Update Article

Scabby the Rat Could Face Extermination under Labor Board General Counsel's Recommendation

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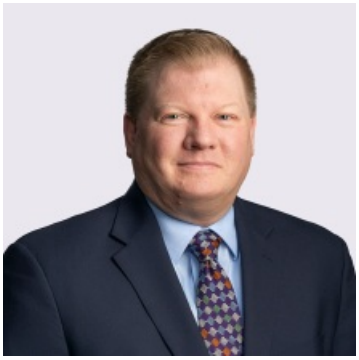

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A recent **Advice Memorandum** from the National Labor Relations Board's (NLRB) General Counsel's office (GC Office) has recommended that the Board engage in pest control.

As background, federal labor law strictly regulates "secondary" activity by unions, including protests against "neutral" businesses with whom there is no dispute. The National Labor Relations Act (NLRA) prohibits unions from threatening, coercing, or restraining these neutral employers to cease business with other businesses. Under the Board's standards, picketing a neutral employer is almost always unlawful. Mere informational handbilling, on the other hand, is not.

Secondary activity often occurs in the construction industry. Labor unions attack not only subcontractors that allegedly pay substandard wages or refuse to enter into project labor agreements with the unions, but also general contractors and business owners that have hired those subcontractors.

For decades, labor unions have used a giant inflatable balloon rat, colloquially known as "Scabby the Rat," to make the public aware of labor disputes. Unions' use of Scabby has not gone unchallenged. For example, a recent federal appeals court decision found lawful a city ordinance that effectively banned "Scabby the Rat" from roadsides. And businesses have also challenged Scabby under the NLRA. In doing so, they have argued that Scabby's use is coercive activity tantamount to picketing. When the NLRB last addressed the issue in 2011, however, it rejected these arguments. The Obama-era NLRB ruled that Scabby was not coercive. The NLRB also expressed concern that a limit on a union's use of such symbols could raise free speech concerns under the First Amendment.

The GC Office's Advice Memo, however, disagrees with the Board's 2011 decision and recommends that it be overturned. After the GC Office evaluated a union's use of one of Scabby's friends, an inflatable "Fat Cat" clutching a construction worker by the neck, it found the use of the Fat Cat was "tantamount to picketing." It said the Fat Cat creates a "symbolic, confrontational barrier to anyone seeking to enter or work at the construction site." The GC Office also found that, even if the conduct were not viewed as similar to picketing, the Fat Cat was coercive enough to be unlawful.

The Memorandum is not controlling law. The five-member NLRB ultimately issues controlling decisions. That said, the GC Office decides which cases to prosecute, so the Advice Memo could result in future challenges to the use of inflatables such as Scabby. Indeed, recent news articles have reported that a test case arising out of Philadelphia is already before the Board.

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