Employment & Labor Law FLASHPOINTS November 2020

Catherine R. Locallo, *Robbins Schwartz* [http://www.rsnlt.com] , Chicago
312-332-7760 | E-mail Catherine R. Locallo [mailto:clocallo@robbins-schwartz.com]

Will "Scabby the Rat" Live To Fight Another Day?

On October 27, 2020, the National Labor Relations Board (NLRB) invited parties and amici to submit briefs in *International Union of Operating Engineers, Local Union No. 150,* 370 N.L.R.B. No. 40 (2020). The NLRB seeks public input on several questions including whether to alter its standard for what conduct constitutes proscribed picketing under the National Labor Relations Act (NLRA), ch. 372, 49 Stat. 449 (1935), what non-picketing conduct is otherwise unlawful under the NLRA, and related First Amendment considerations. In the underlying case, the administrative law judge found that a union's stationary display of a 12-foot inflatable rat (Scabby the Rat) and two banners for four days on public property outside a trade show did not constitute picketing or otherwise coercive non-picketing conduct in violation of §8(b)(4) of the NLRA. *International Union of Operating Engineers, Local Union No. 150,* Case 25-CC-228342, 2019 WL 3073999 (N.L.R.B. July 15, 2019). The ALJ's decision aligns with past precedent involving the rat and large banners on public property. The invitation for briefs could be a signal that the landscape may be changing and that Scabby may not live to fight another day.

Background

International Union of Operating Engineers, Local Union No. 150, was involved in a labor dispute with MacAllister Machinery, Inc. Lippert Components, Inc., supplies RV components to the mobile home and marine industries and rents some of its equipment from MacAllister. Lippert does not employ any union employees and never had discussions with the Union about employee conditions. *Id.*

Thor Industries, one of Lippert's largest customers, hosted its annual trade show in Elkhart, Indiana, from September 24 through September 27, 2018. Several suppliers displayed their products and services to other dealers at the trade show. These suppliers included Lippert and Thor.

On the first day of the trade show, Union agents posted Scabby the Rat, an inflatable rat approximately 12 feet in height with red eyes, fangs, and claws, near the entrance of the trade show. They also placed two stationary banners about 8 feet long and nearly 4 feet high next to Scabby. One brightly colored banner read, "OSHA Found Safety Violations Against MacAllister Machinery, Inc.," and the other banner read, "Shame on Lippert Components, Inc. for Harboring Rat Contractors." *Id.* The Union agents sat next to Scabby and the banners, but they did not march, patrol, or carry or display picket signs. Trade show attendees had to drive past Scabby and the two banners in order to park their cars. *Id.*

Lippert said that Scabby and the banners were somewhat embarrassing to Thor and Lippert. Lippert representatives also opined that Scabby was "quite menacing in its appearance" and was "intended to be scary." *Id.* Lippert attempted to contact the Union about the display, but they never spoke during any days of the trade show.

Lippert filed a charge with the NLRB alleging that the Union's display of Scabby and the banners near public entrance of a trade show induced or encouraged persons engaged in commerce to refuse to handle or work on goods or perform services and threatened, coerced, or restrained Lippert and other

persons engaged in commerce in violation of the NLRA. A complaint was issued and the ALJ ruled that the Union's conduct did not violate the NLRA.

ALJ Decision and Current Case Status

The ALJ's decision included an overview of the law relevant to the issues presented in the case. This included the Supreme Court's decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568, 99 L.Ed.2d 645, 108 S.Ct. 1392 (1988), that peaceful handbilling outside mall stores urging customers not to patronize the establishments did not violate the NLRA. *International Union of Operating Engineers, Local Union No. 150,* Case 25-CC-228342, 2019 WL 3073999 (N.L.R.B. July 15, 2019). In *DeBartolo, supra,* the union had a primary dispute with a construction company for allegedly paying substandard wages. 108 S.Ct. at 1395. DeBartolo, a mall owner, contracted with the construction company the union had a dispute with to build a department store in the mall. *Id.* (This made DeBartolo a secondary employer as it had no direct labor dispute with the union; rather, it was employing a company involved in a labor dispute with the union, so the union had a secondary dispute with the mall owner.) In response, union members handed out fliers at the mall entrances informing the public of the dispute and seeking to use publicity to pressure DeBartolo to hire companies that pay fair wages. *Id.* The Court ultimately found that "more than mere persuasion is necessary to prove a violation of §8(b)(4)(ii)(B)" of the NLRA and that "[t]he loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do." 108 S.Ct. at 1399 – 1400. The union did not have picket signs and did not patrol and, therefore, the Court found that this was not tantamount to picketing, and ultimately found that peaceful handbilling of a secondary employer is protected by the First Amendment and not proscribed by §8(b)(4) of the NLRA. 108 S.Ct. at 1394.

Later in 2010, the NLRB extended the holding in *DeBartolo* and found that stationary banners, like handbilling, are noncoercive conduct, which does not violate §8(b)(4)(ii)(B) of the NLRA. *United Brotherhood of Carpenters & Joiners of America, Local Union No. 1506,* 355 N.L.R.B. 797 (2010). In that case, the union placed banners (several feet high and several feet long) on the public sidewalk outside a secondary employer's facility. One read: "SHAME ON [secondary employer]" and "Labor Dispute" while the other read "DON'T EAT 'RA' SUSHI." 355 N.L.R.B. at 798.

In 2011, the *DeBartolo* holding was further extended by the NLRB to find that a union's display of a large inflatable rat outside the workplace of a secondary employer hospital did not violate the NLRA. *Sheet Metal Workers International Association, Local 15, AFL-CIO,* 356 N.L.R.B. 1290 (2011). The rat was approximately 16 feet tall and 12 feet wide (picture Scabby in your mind). *Id.* The NLRB found "no evidence here to support a finding that the display of the inflatable rat . . . constituted non-picketing conduct that was unlawfully coercive." 355 N.L.R.B. at 1292.

Based on the facts and the precedent noted above, the ALJ in the instant case determined that Lippert (and Thor) were secondary employers and, thus, the Union had a secondary dispute with these companies. *International Union of Operating Engineers, Local Union No. 150,* Case 25-CC-228342, 2019 WL 3073999 (N.L.R.B. July 15, 2019). Next, relying on *United Brotherhood,* the ALJ held that the banners and inflatable rat the Union displayed near the trade show entrance did not constitute proscribed picketing in violation of the NLRA because it "lacked the essential 'element of confrontation that has long been central to our conception of picketing for the purposes of the [NLRA's] prohibitions.' " *Id.* The ALJ next rejected the argument that even if the rat and banners did not constitute picketing, the Union's conduct should be considered unlawfully coercive tactics because the timing and location of the Union's display brought Lippert and Thor into the Union's dispute in MacAllister. *Id.* Under the line of cases above, the ALJ found that due to the stationary, passive nature and speech component of the banners and inflatable rat, there was no coercive action taken that would have caused disruption of the RV show or otherwise coerced or intimidated patrons. Notably, there was no evidence that access was blocked,

traffic was stopped, patrolling by Union members or loud/disruptive noises. Under *United Brotherhood,* this author's interpretation is that the ALJ believes that the public may not find the rat to be scary.

Next, the ALJ determined that the banners and rat did not constitute "signal picketing" in violation of the NLRA for Lippert and Thor employees to stop work. *Id.* In proving a violation of the NLRA for "signal picketing," "the evidence must prove that the alleged conduct 'would reasonably be understood by the employees as a signal or request to engage in work stoppage against their own employer.' " *Id.,* quoting *Southwest Regional Council of Carpenters,* 356 N.L.R.B. 613, 616 (2011) (finding that banner displays using the words "labor dispute" was not a signal to employees to cease work). The evidence must also prove that the object of the conduct is to compel the secondary employer to cease doing business with the primary employer. *International Union of Operating Engineers, Local Union No. 150,* Case 25-CC-228342, 2019 WL 3073999 (N.L.R.B. July 15, 2019). The ALJ found that the Union's banners stated that safety violations had been found and announced sham on Lippert and Thor for using MacAllister, whom the Union described as a "rat contractor." *Id.* Neither suggests or alludes to the fact that employees should cease work and there was no evidence that employees stopped work. Finally, the ALJ found that the banners are protected under the First Amendment because they convey information to the public about events that have transpired, including OSHA safety violations, and no evidence was presented that the claim was false, and of a business relationship between the employers involved. *Id.*

Exceptions to the ALJ's decision were filed and the matter is under consideration by the NLRB. Based on the scope of the request for amici briefs, the NLRB will decide whether to modify or overrule past precedent on the issue of displaying stationary rats and banners in public places and what the appropriate standard should be, all of which also implicates First Amendment considerations.

For those interested in submitting briefs in support of or in opposition to Scabby the Rat, the NLRB's order states that briefs by the parties and amici not exceeding 25 pages in length and briefs by amici not exceeding 20 pages shall be filed with the Board in Washington, DC, on or before November 27, 2020, and December 28, 2020, respectively. This will be a case to watch in 2021!

For more information about employment and labor law, see CONDUCTING THE EMPLOYMENT PRACTICES AUDIT (IICLE®, 2020). Online Library subscribers can view it for free by clicking here [https://www.iicle.com/IicleOnline/Detail/33418] *. If you don't currently subscribe to the Online Library, visit www.iicle.com/subscriptions* [http://www.iicle.com/subscriptions] *.*