

New General Counsel for Labor Board May Change Fate of ‘Scabby the Rat’

By Jonathan J. Spitz & Richard F. Vitarelli

February 17, 2021

Meet the Authors



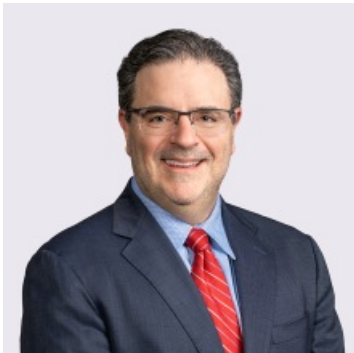
Jonathan J. Spitz

(He/Him • Jon)

Principal

(404) 586-1835

Jonathan.Spitz@jacksonlewis.com



Richard F. Vitarelli

Principal

860-331-1553

Richard.Vitarelli@jacksonlewis.com

Related Services

Construction

Labor Relations

National Labor Relations Board (NLRB) Acting General Counsel Peter Ohr has filed a motion with the board to stop processing a case on whether to change NLRB standard for determining the lawfulness of union displays of stationary banners and inflatable rats at the workplace of a neutral employer.

He also asked that the case be remanded to the regional director (who will dismiss it) or be dismissed by the board.

Background

The National Labor Relations Act (NLRA) protects employees’ right to strike and the right to publicize that strike by peaceful picketing. A strike is not necessary for a picket line because unions have the right to publicize their issues even without a strike.

Employees and unions are not limited to using picketing as a vehicle to publicize their issues. A common, less impactful method is *handbilling*.

Picketing can be unlawful. For instance, “secondary” picketing directed at a neutral employer to coerce it to cease working with a company that *is* a party to the labor dispute is unlawful.

However, where picketing is unlawful, handbilling is protected. Decades ago, building trade unions augmented their lawful handbilling by accompanying it with an inflatable rat or a large banner proclaiming their message. It became apparent to some that the rat or banners were stand-ins for the picket line. Construction employers started noticing deliveries would not be made and some refusals to work.

Case at the Board

The legal question became *is the rat the functional equivalent of the picket line?* If it is unlawful to picket, does handbilling with an inflatable rat cause the same disruption?

The NLRB requested friend-of-the-court briefs seeking comments as to whether it should overrule its cases finding nothing in the NLRA prohibited exhibiting stationary banners, 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. *Lippert Components*, 370 NLRB No. 40 (Oct. 27, 2020). For details of the legal twists and turns, see our article, [Why Is ‘Scabby the Rat’ a Legal Dilemma?](#)

Twenty-four briefs were filed with the board in response. By mid-January, the case was ready for a decision. Within weeks of being appointed to his position, Ohr filed his motion. The NLRB will be deciding on the motion.

Implications

The NLRB has been considering “rat” cases for almost 20 years. During that time,

Republican-appointed general counsels have pressed to find use of the rat (or banner) to be unlawful, only to be reversed under a Democrat administration. Today, the issue is ripe for decision by an NLRB comprised of three Republicans and one Democrat. If the NLRB rejects Ohr's motion and holds a union's use of an inflatable rat is unlawful, that decision likely will be appealed in the federal circuit courts. Ultimately, the U.S. Supreme Court may need to rule on this issue.

As a practical matter, even if Scabby is ruled unlawful, unions likely will find another attention-grabbing stunt.

If you have any questions, please contact the Jackson Lewis attorney with whom you work.

©2021 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.