NLRB Permits Use of Giant Inflatable Rats Against Employers with Whom Unions Have No Labor Dispute

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Recently, the National Labor Relations Board decided that a union's positioning of a giant inflatable rat near the entrance of a construction project at an acute care hospital where neutral employers worked (*i.e.*, those with whom the union has no labor dispute) does not violate the National Labor Relations Act. *Sheet Metal Workers Int'l Assoc., Local 15 (Brandon Reg'l Med. Ctr.)*, 356 NLRB No. 162 (May 26, 2011).

In what has become a common pattern with the Board, Chairman Liebman and Members Pearce and Becker were in the majority, and Member Hayes dissented.

The National Labor Relations Act prohibits unions from inducing strikes or picketing against neutral employers (also called secondary employers) with whom the unions have no labor dispute, but it does not prevent unions from engaging in this activity against employers with whom the unions have the dispute (called primary employers). Where primary and neutral employers work side-by-side at a worksite (like a construction project), the Act prohibits unions from picketing the worksite since doing so embroils neutral employers in a labor dispute over which they have no control. Where, however, the unions' actions look more like pure symbolic speech—rather than conduct that resembles picketing—the limitations of the Act give way to the free speech protections of the First Amendment. Unions can therefore lawfully publicize the fact that neutral employers use non-union workers or sell products made by non-union companies as long as they do not picket when doing so; but the line between lawful expressive activity and unlawful picketing is often murky and difficult to define.

Previously in the *Brandon Regional Medical Center* case, the Board concluded that a mock funeral staged in front of the entrance to the construction site constituted picketing. The union appealed this ruling and the U.S. Court of Appeals for the District of Columbia Circuit reversed the Board, concluding that the union's mock funeral did not amount to picketing and its actions were not otherwise coercive. The appellate court remanded the case back to the Board where the stationing of the giant inflatable rat had been a part of the case, but the Board never passed on it lawfulness because its decision on the mock funeral made it unnecessary to do so.

In considering the rat display, the Board noted that nothing in the Act prohibits a union from peaceful, stationary displays of banners and information, and the rat display did not constitute picketing. A stationary display could turn into picketing and violate the Act, however, if it involved an element of confrontation through actual or symbolic barriers, but that did not occur in this case. Therefore, the Board found that the rat display did not amount to picketing and was not otherwise coercive.

The Board also went on to support its decision on First Amendment grounds by reference to the Supreme Court's ruling in *Snyder v. Phelps* (the "God Hates F–gs" case), reasoning that if the speech in *Snyder* falls within the High Court's boundaries of protected speech, the union's rat display surely did as well.

Unions have long-used the giant inflatable rat as a pressure tactic against employers. In light of the Board's decision in *Brandon Regional Medical Center*, employers can expect to see more of the rat, even if they have no active union disputes. Employers should remember, though, that displays of the rat can turn into to picketing when union officials (or those acting at their direction) actively confront the public or block ingress or egress. And even when construed as non-picketing activity, use of the rat can become unlawfully coercive when accompanied by actions that interfere with the secondary employer's operations (like blaring messages through a bullhorn or hurling objects at the worksite).

More Information

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