

SCABBY THE RAT, THE NLRA, AND THE FIRST AMENDMENT

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Scabby is a large, cartoon inflatable rat. He has red eyes, large teeth, and a scabby belly. Such attention-getting inflatable rats are sometimes used by unions to protest against “rat” contractors. The Board explains that “various meanings have been assigned to unions’ use of a rat caricature or the word “rat.” Rat can “refer to some sort of labor dispute between a union and an employer or as “a contractor that does not pay all of its employees prevailing wages” or benefits. *IUOE*, 2019 WL 6838679, at *2 (ALJD).

Judge Richard Posner wrote that large-inflated “rubber rats” are “widely used by labor unions to dramatize their struggles with employers” and “protected by the First Amendment.” “The rats are the traditional union picketers’ signs writ large.” *Laborers’ Local 330 v. Town of Grand Chute*, 834 F.3d 745, 752 (7th Cir. 2016).



Scabby

1.

The Board in July 2021 rejected an effort by Trump-appointed General Counsel Peter Robb to ban the rat.

The Board reaffirmed that a union’s display of an inflated Scabby rat and banners at the neutral employer’s work site are lawful and do not violate the secondary boycott provision of Section 8(b)(4) of the National Labor Relations Act. *IUOE Local 150 (Lippert Components, Inc.)*, 371 NLRB No. 8 (2021).

In a 3-1 decision, the Board affirmed *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010), and *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB 1290 (2011). These cases held that the display of inflatables near a neutral employer’s premises does not “threaten, coerce, or restrain” with the object of forcing or requiring the neutral employer “to cease doing business” with the primary employer. Chairman Lauren McFerran and Members John Ring and Marvin Kaplan issued concurring opinions. Member William Emanuel issued a dissent.

Lippert Components address the union’s labor dispute with MacAllister Machinery which leased heavy machinery and equipment to Lippert. Lippert attended a trade show during which union agents posted Scabby (about 12 feet tall) and two banners near the trade show’s entrances. One banner approximately 96 in. long and 45 in. high read, “OSHA found safety violations against MacAllister, Inc.” The other banner, approximately the same size read, “Shame on Lippert Components, Inc., for harboring rat contractors.”

Chairman McFerran concurred, explaining that under the “constitutional avoidance doctrine,” the potential infringement of a union’s First Amendment rights precludes the Board from finding that the banners and Scabby in these circumstances violate Section 8(b)(4)(ii)(B). Slip Op. 2. This doctrine, per *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction*

Trades Council, 485 U.S. 568 (1988), requires the Board to avoid interpreting the NLRA in a way that raises serious constitutional concerns.

While *DeBartolo* did not concern inflatable rats, Members Ring and Kaplan wrote that constitutional avoidance “cannot persuasively be limited to handbilling” (Op. 5):

[T]he union’s display of an inflatable rat and banner [does] not violate Section 8(b)(4)(ii)(B). Interpreting that statutory provision would raise serious First Amendment issues. The display of banners and inflatable rat was clearly expressive activity, conveying the Union’s message that MacAllister had committed OSHA violations and was a “rat contractor,” that Lippert should be ashamed to do business with it, and, implicitly, that MacAllister’s alleged conduct should be opposed by abstaining from doing business with Lippert.

2.

Lippert Components fits squarely with well-established precedent, such as *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58 (1964), which held that Section 8(b)(4) did not prohibit peaceful secondary picketing at neutral business establishments. There, picketers asked the public not to buy a struck product. The Court based its decision in part on its concern “that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.” *Id.* at 63. See also, *NLRB v. Catholic Bishop of Chicago*, 444 U.S. 490 (1979) (the Board cannot exercise jurisdiction over nonsecular schools because such coverage would raise serious questions under the First Amendment).

The courts and the Board have frequently invoked the constitutional avoidance doctrine in cases where expressive union conduct is challenged by Section 8(b)(4)(ii)(B). *520 South Michigan Avenue Associates, Ltd. v. UNITE HERE*, 760 F.3d 708, 723 (7th Cir. 2014) (“the Supreme Court has cautioned us to be especially careful not to label expressive union conduct as coercive if such an interpretation could interfere or limit free speech”); *Carpenters Local 1827 (United Parcel Service, Inc.)*, 357 NLRB 415, 416 (2011) (“our duty [is] to avoid construing the Act, if possible, to avoid raising serious constitutional questions”); *Eliason & Knuth*, 355 NLRB at 807 (bannering does not violate NLRA “is supported, if not mandated, by the constitutional concerns that animated” *DeBartolo*). These decisions leave no doubt that the law required the Board in *Lippert Components* to apply the constitutional avoidance doctrine.

Members Ring and Kaplan note that certain picketing activity and “secondary activity” that “seeks to achieve its objective through intimidation . . . may be found unlawful without posing serious questions of the validity of Section 8(b)(4) under the First Amendment.” *Lippert Components*, Op. 5, quoting *DeBartolo* (internal quotation omitted).

3.

Member Emanuel dissenting, states that Scabby, “replete with red eyes, fangs, and claws.” is so disturbing and intimidating that he is “coercive even if viewed as non-picketing conduct.” That is because the “size of the symbolic display combined with its location and threatening or frightening features could render it coercive within the meaning of Section 8(b)(4)(ii).” Member

Emanuel asserts that Scabby would not be subject to the constitutional avoidance doctrine because the use of Scabby is “predominated by coercion and intimidation.” Op. 10.

4.

Member Emanuel, however, does not show that the inflatable rat is intimidating or coercive. Indeed, Scabby is not any “creepier” than the Charlie Brown inflatable used in the Macy’s Thanksgiving Day Parade.

Member Emanuel does not address that Scabby is protected First Amendment speech. But the First Amendment protects banners and inflatable displays. *Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005) (“a rat balloon to publicize a labor protest is constitutionally protected expression within the parameters of the First Amendment, especially given the symbol’s close nexus to the Union’s message”). To hold that displaying Scabby violates the NLRA would raise serious questions about the constitutionality of Section 8(b)(4)(ii)(B).

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.” The display of signs and banners to convey written messages of public concern constitutes speech protected by the First Amendment. See *U.S. v. Grace*, 461 U.S. 171, 176 (1983) (“peaceful picketing and leafletting are expressive activities involving ‘speech’ protected by the First Amendment.”) and *Carlson v. California*, 310 U.S. 106, 112-13 (1940) (“The carrying of signs and banners . . . is a natural and appropriate means of conveying information on matters of public concern.”).

The constitutionality of displaying Scabby cannot be nullified by describing the “rat” as threatening. Speech “cannot be restricted simply because it is upsetting or arouses contempt.” *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (“Thank God for 9/11” signs protected).

In sum, the rat as a symbol of protest in labor disputes will continue to be used. *Lippert Components* teaches that Scabby and Section 8(b)(4) and the First Amendment can continue to coexist harmoniously. ■