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The Saga of Scabby: How a Giant Inflatable Rat Helped Define Free Speech in Organized Labor

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Since the 1980s, a giant inflatable rat named "Scabby" has been a symbol of labor protests across the US.[1] Standing up to 25 feet tall with red eyes and sharp claws, Scabby has been subjected to police confiscations, stabbings, and multiple courtroom battles.[2] In 2018, these legal challenges culminated in *Int'l Union of Operating Engineers*, 371 NLRB No. 8 (July 21, 2021) ("*Lippert*").[3] There, Lippert Components filed a labor complaint against International Union of Operating Engineers Local 150 ("IUOE Local 150") for picketing Lippert using Scabby.[4] Lippert, a "neutral employer", contended that this demonstration violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act ("NLRA").[5] While Trump-era National Labor Relations Board ("NLRB") General Counsel Peter Robb supported the action, a change in administration (and Robb's eventual ouster from his position) led to a 3-1 decision by the NLRB in support of Scabby.[6] In determining that the use of Scabby was protected free speech, the majority

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[1] Amanda Aronczyk, *The History of Scabby the Rat,* NPR (Dec. 18, 2020, 5:03 AM), https://www.npr.org/2020/12/18/947918263/the-history-of-scabby-the-rat.

[2] *Id.*

[3] Office of Public Affairs, *Board Issues Decisions on Inflatables and Bannering*, NLRB (July 21, 2021), https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-on-inflatables-and-bannering.

[4] *Id.*

[5] *See generally Int'l Union of Operating Engineers*, 371 NLRB No. 8 (July 21, 2021) (Section 8(b)(4)(ii) states in part that it is an unfair labor practice for a labor organization "to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce…") [hereinafter *Lippert].*

[6] Brett P. Owens, *Scabby the Rat to Remain a Fixture at Union Protests*, FISHER PHILLIPS (July 22, 2021), https://www.fisherphillips.com/news-insights/scabby-the-rat-fixture-union-protests.html.

found "prohibiting an inflatable rat and stationary banners shaming a secondary employer would raise significant constitutional concerns."[7]

This decision poses unique questions regarding employer/labor relations. Employers and businesses have a vested interest in preventing the presence of Scabby and protests in general. Conversely, unions remain motivated to maximize the well-being of their members through any legitimate means necessary. What, then, is the middle ground? Can businesses and unions, through a collective bargaining agreement (CBA), mutually decide to prevent the use of Scabby? More broadly, and perhaps more importantly, can CBAs be utilized to limit the First Amendment rights of unions and their members?

The Supreme Court holds that contractual limits on Free Speech, so long as they are "self-imposed", are valid between private parties.[8] For instance, non-disclosure agreements, which by their very nature limit otherwise protected speech, are legally utilized in a variety of contexts.[9] Similarly, under a CBA unions can voluntarily waive their First Amendment right to strike through a no-strike clause.[10] Because Section 7 of the NLRA allows employees " to bargain collectively through representatives of their own choosing", these no-strike agreements are contractually binding.[11] Accordingly, one solution for employers to protect themselves from Scabby is straightforward: employers can prevent picketing of any sort by including a no-strike clause in the CBA. This arrangement also provides a

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[7] Sarah Keisler, *Labor Union Symbol 'Scabby the Rat' Declared Protected Speech*, FREE SPEECH PROJECT (Sept. 2, 2021), https://freespeechproject.georgetown.edu/tracker-entries/labor-union-symbol-scabby-the-rat-declared-protected-free-speech.

[8] *See* Abigail Stephens, *Contracting Away the First Amendment? When Courts Should Intervene in Non-Disclosure* Agreements, 78 WM. & MARY BILL OF RIGHTS J. 541, 543 (2019).

[9] Catherine Bragg, *Non-Disclosure Agreements in Review*, ABA (Aug. 20, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/summer/non-disclosure-agreement/.

[10] *No Strike Clause Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/n/no-strike-clause/ (last visited Oct. 17, 2022).

[11] *National Labor Relations Act*, NLRB, https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act (last visited Oct. 17, 2022).

bargaining chip for Unions that can use a no-strike agreement to gain concessions of their own.[12]

Still, while a no-strike provision can protect a primary employer (ie. the immediate employer of the Union employees) from protests, it would not help in a situation like *Lippert*. Section 8(b)(4)(ii) of the NLRA protects the right of Unions to protest "neutral" employers so long as such conduct does not "threaten, coerce, or restrain any person engaged in commerce."[13] "Neutral" employers are defined as employers who do not have a direct dispute with the protesting union, but who may do business with the primary employer or in a similar industry.[14] Partially due to the unprotected nature of neutral businesses use of Scabby in such protests has proved contentious, leading to multiple suits against unions.[15]

Such was the case in *Lippert*, where IUOE Local 150 used Scabby to protest the "neutral" Lippert for supplying parts to a company in dispute with Local 150.[16] Then-NLRB General Counsel Robb, utilizing the language of Section 8(b)(4)(ii), argued in *Lippert* that Scabby was being utilized "to menace, intimidate and coerce in aid of an unlawful purpose… pedestrians, guests, employees and contractors … could not avoid large, intimidating, hostile-looking inflatable rats that were mere feet, and sometimes inches, away from them."[17] As mentioned above, the NLRB rejected this position, instead relying on precedent to determine that Scabby is inherently protected speech under the First Amendment.[18] Specifically, the NLRB

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[12] USLEGAL, *supra* note 10.
[13] NLRB, *supra* note 11.
[14] *Neutral Employer,* WESTLAW, https://1.next.westlaw.com/Document/Id4cf18cff3ad11e28578f7ccc38dcbee/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search) (last accessed Oct. 10, 2022).
[15] *See Sheet Metal Workers Int'l Ass'n*, 356 NLRB 1290 (2011); *In Re United Bhd. of Carpenters & Joiners of Am., Loc. Union No. 1506*, 355 NLRB 797 (2010).
[16] Irina Iyanova, *A giant inflatable rat called "Scabby" is constitutionally accepted free speech*, CBS NEWS (July 22, 2021).
[17] Keisler, *supra* note 7.
[18] *Lippert*, *supra* note 5 at 2.

looked to Obama-era decisions in *Eliason & Knuth of Arizona* and *Brandon Regional Medical Center*, each of which supported the right of unions to use Scabby or banners in protestation of neutral employers.[19]

While labor organizations celebrated the *Lippert* decision[20], others criticized the ruling as having "substantially eroded the protection given to "neutral" parties".[21] *Lippert* put neutral employers in a difficult position. These employers do not have direct relations with the unions themselves. As a result, they lack the ability to bargain for no-strike clauses in a CBA. Accordingly, neutral employers are devoid of contractual protections from protests that primary employers can bargain for. At the same time, unions have a vested interest in utilizing free speech to protect their interests. Minimizing unions' remedies for protests too much risks making their powers toothless.

In *Lippert,* the NLRB seems to have struck an appropriate balance between these competing principles. Singling Scabby out as a scapegoat would raise worrying questions about whether unions had any meaningful ability to protest neutral employers under the NLRA. Banning Scabby for being unpleasant could be seen as a blanket ruling against any signage deemed to cross an arbitrary line. Demonstrations, by their very nature, are designed to draw attention to a cause. Mandating that they be bland or innocuous renders them worthless. Additionally, the ruling incentivizes businesses to take care in choosing whom they deal with. By engaging in commerce with ethical, labor-friendly entities businesses can avoid being targeted by dissatisfied unions.

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[19] *Id.* at 1.

[20] *SCABBY WINS AGAIN! NLRB Dismisses Lawsuit Threatening Use of Inflatable Rats*, INT'L UNION OF OPERATING ENGINEERS LOCAL 150 (July 22, 2021), https://local150.org/newsroom/scabby-wins-again-nlrb-dismisses-lawsuit-threatening-use-of-inflatable-rats/.

[21] Harry I. Johnson III, *NLRB Protects 'Scabby The Rat' Instead of Neutral Parties*, MORGAN LEWIS (July 23, 2021), https://www.morganlewis.com/pubs/2021/07/nlrb-protects-scabby-the-rat-instead-of-neutral-parties.

Lippert likewise doesn't leave neutral employers defenseless. As the NLRB made clear in their decision, picketing and other disruptive conduct remain illegal against neutral employers.[22] In fact, the concurring majority opinion placed implicit limits on prior case law.[23] In their decision, the NLRB stated:

> Congress intended that Section 8(b)(4) be applied flexibly and sensibly, drawing upon the Board's unique expertise, to protect neutrals from a broad range of coercive secondary activity… While Section 8(b)(4) is not so broad as to prohibit the display at issue in this case, neither may it properly be narrowed in the manner posited by the *Eliason & Knuth* and *Brandon* majorities. Instead, as the Court instructed in *Tree Fruits*, the prohibition of Section 8(b)(4) "is keyed to the coercive nature of the conduct, whether it be picketing or otherwise."[24]

Within this context, *Lippert* can be seen as a victory for employers. While *Lippert* affirmed the use of Scabby at neutral site protests, it likewise opened the door for neutral employers to bring suit against non-picketing protests that nonetheless can be viewed as coercive.

Odd as it may seem, this giant inflatable rodent has become a lightning rod for First Amendment controversies. And with Scabby inflatables sold and distributed across the nation and even into Canada, that debate isn't likely to end soon.[25] As both a symbol of free speech and a tool for unions, Scabby seems poised to remain a mascot at protests for years to come. As long as he does, his presence will continue to drive spirited debates surrounding the limits of Free Speech and the NLRA.

Edited by Allison Frisella

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[22] *Lippert*, at 6.
[23] *Id.* at 7.
[24] *Id.*
[25] Sarah Jaffe, *The History of Scabby the Rat*, VICE (Mar. 7, 2013), https://www.vice.com/en/article/avnmgp/the-history-of-scabby-the-rat.