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Labor Law and the Inflatable Rat

Virtually every New Yorker has experienced the phenomenon of walking down a bustling city street, only to be confronted by a large inflatable rat stationed in front of a place of business, accompanied by protesting union agents and supporters gathered around the oversized rodent. The Rat is becoming as common in New York City as corner hot-dog vendors. Its legality, however, is by no means clear.

The Rat was first spotted in Chicago in 1987.[1] Since then, the original rat has spawned offspring, many of which have found their way to the streets of New York City. Unions have placed inflatable rats in front of apartment buildings, retail stores, and even the occasional Broadway show.[2] The rat has also been spotted outside Manhattan, at construction sites in Brooklyn and in the suburbs of Long Island.[3] In 1999, one of the rats was arrested in New York, when a member of the Laborers Union, Local 78 refused to deflate it during a union protest (it was later released).[4] Aside from the rat's public persona, there is a developing body of legal opinion, but not much law, surrounding whether unions' use of the rat as a means of alerting the public, employees and non-union employers to the presence of a labor dispute is lawful or unlawful.

Traditionally, the epithet "rat," like the term "scab," referred to a replacement employee who crosses a picket line during a strike.[5] The "rat" label, and its image, also have been used by unions to describe employers who do not hire union employees or supposedly do not pay prevailing wage rates.[6] In recent years, many of the rats around New York have been stationed in front of such employers. The National Labor Relations Board, however, has not yet articulated a clear standard for determining when the rat, either in conjunction with other conduct or standing alone, constitutes unlawful picketing.

'Secondary' Activity

Section 8(b)(4) of the National Labor Relations Act prohibits unions from engaging in "secondary" activity, defined as picketing or other coercive activity directed at a company with which the union has no dispute but which does business with the employer with whom the union is actually engaged in a labor dispute. Section 8(b)(7) of the act proscribes the use of pickets by a union for organizational or

recognitional purposes where (i) the employer has lawfully recognized another union; (ii) a board election has been held in the previous 12 months; or (iii) the union pickets for more than 30 days without filing a petition for election.[7] Employers often argue that by inflating the rat in front of their business, thereby turning away suppliers, customers, and even employees, a union has violated §§8(b)(4), 8(b)(7), or both.

While "picketing" is a malleable term, the board has held that an essential element involves confrontation between persons stationed at an employer's place of business, on the one hand, and employees, customers or suppliers trying to enter the premises of the picketed employer on the other.[8] Typically, pickets involve the use of placards, noise, and patrolling by union members or supporters.

Signal to Neutral Employees

The board has defined a concept termed "signal picketing" as a form of unlawful picketing under §8(b)(4).[9] "Signal picketing," as the phrase suggests, involves the use of a signal to encourage neutral parties to engage in conduct sympathetic to the union's cause. The debate over whether a union's use of the inflatable rat constitutes unlawful picketing focuses, in part, on whether the rat constitutes a signal to neutral employees.

The board will look at the overall context surrounding a union's behavior to decide whether its actions are threatening or coercive, or its purpose is to induce sympathetic conduct by neutrals.[10] For example, the board has found unlawful activity when an unusually large number of union supporters shouted at neutral employees entering the facility,[11] and where union protesters expressed support and offered protection to neutral employees who refused to work for the picketed employer in support of the union.[12] On the other hand, peaceful handbilling aimed at persuading customers not to enter a targeted employer does not violate the act.[13] The question is whether the rat is pure communication, like handbilling, or a more confrontational call for sympathetic action, like picketing.[14]

On which side of that line does the rat nest? In 1995, the board affirmed, without comment, the ruling of an administrative law judge who found that a union violated §8(b)(4) when it engaged in picketing that included the use of a union "observer" wearing a rat costume.[15] But the board has not yet directly addressed whether the use of the rat constitutes unlawful picketing.

In deciding whether to issue a complaint against alleged violations of the act, a regional office of the board may submit its investigatory findings to the General Counsel's Division of Advice in Washington D.C. The resulting advice memoranda are often made public. The board's Office of the General Counsel, who is ultimately responsible for prosecuting violations of the act, has considered the rat issue in several "advice memoranda." More recently, two administrative law judges have issued decisions finding that the rat constituted unlawful secondary picketing.

In March 2003, an advice memorandum recommended to Region 12 in Tampa, Florida that it file a complaint against a union that stationed a 16-foot rat close to the main entrance of a hospital that it accused of using a non-union staffing agency.[16] Union members and supporters also distributed handbills to the public, stating that there was a "rat at Brandon Regional Hospital."

By failing to distinguish the target of the union's conduct (the staffing agency, and not the hospital), the division of advice concluded that the union's message was not a truthful expression protected by either the First Amendment or the act. Rather, the union's placement of the rat closer to the hospital's main entrance than to the targeted construction sites, in combination with the handbills, suggested falsely to the public that the hospital was in fact the "rat" employer.

Significantly, the division of advice stated for the first time that "[t]he union's use of an inflatable rat, a well-known symbol of labor unrest, is tantamount to picketing." Region 12 issued a complaint, a hearing ensued, and in December 2004, an administrative law judge found that the union's use of the rat under the circumstances was more confrontational than informational, and

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therefore constituted unlawful picketing.[17]

Rats in Manhattan

In the last few years, Region 2 in Manhattan has investigated several charges that unions' use of the rat violated Sections 8(b)(4) or 8(b)(7) of the act. In a charge filed on April 10, 2002, the Calleo Development Corporation alleged that Local 79 of the Asbestos, Lead & Hazardous Waste Laborers prevented a supplier from making deliveries at two of its worksites by "positioning the 'Union Rat' so as to block and interfere with deliveries."[18] Region 2 issued a complaint based, in large part, on the way the rat was used in that situation. The employer eventually withdrew the charge.

Yates Restoration Group filed a charge alleging that members of Local 1 of the Bricklayers Union induced and encouraged secondary employees to stop work by stationing the rat in front of the Metropolitan Life Building in Midtown Manhattan.[19] Although Region 2 declined to issue a complaint in that case, it observed that "the stationing of an oversized inflatable rat may signal an invisible picket line in certain circumstances."[20]

In a June 25, 2003 advice memorandum, Region 2 was advised to issue complaint against Local 78, Asbestos, Lead and Hazardous Waste Laborers.[21] The union had set up the rat for 13 days in front of the Hampshire House co-op building on Central Park South, protesting the building's use of a non-union asbestos abatement company. The rat was adorned with signs reading "Hampshire House Hires Asbestos Cos. That Exploit Workers," and union agents handbilled the building's tenants and the general public while wearing union insignia.

Notwithstanding the union's efforts to characterize its activity as non-coercive and solely informational, the advice memorandum stated that Local 78's use of the rat constituted a "signal" to neutral employees that there was a labor dispute and that the signal would inherently induce neutrals to stop delivering or providing services to the building. The advice memorandum emphasized that even if no neutral employees engaged in sympathetic activities, the union's conduct would be unlawful to the extent that it "constitutes inducement and encouragement under Section 8(b)(4)(i)(B)." The case was subsequently resolved without a trial.

Similarly, in a charge filed on Aug. 25, 2003, Café Centosette alleged that Laborers Local 78 engaged in unlawful picketing that included the use of the rat in front of the restaurant's Second Avenue entrance.[22] Region 2 issued a complaint in that case, but it, too, was subsequently withdrawn.

By contrast, a Jan. 16, 2004 advice memorandum recommended that a complaint not be issued against Bricklayers Local 1 under §8(b)(7)(A) for conduct that included use of the rat.[23] Although the memorandum observed that "a rat is a well-known symbol of a labor dispute and could constitute a signal to third persons that there is an invisible picket line they should not cross," it found that the case was not a "good vehicle" for asserting that theory. The evidence that the picketing and handbilling was organizational was equivocal; the rat had been posted inconsistently, while on other days a balloon of Uncle Sam, which has no significance in the labor context, was used; the union took measures to ensure that employees continued working; and the conduct ceased several months prior to issuance of the advice memorandum.

Similarly, a Feb. 24, 2005 advice memorandum recommended that 8(b)(4) and (7) charges against Laborers Local 78 filed by a Manhattan apartment building be dismissed where the facts were close to those at issue in Yates Restoration Group.[24] In particular, the division of advice noted that the rat carried no signs that might confuse the primary and neutral employers; the union clearly identified itself as representing construction employees, the type employed by the primary, rather than building service employees, the type employed by the secondary; and the rat was stationed close to the construction entrance. But none of these distinctions addressed the heart of the matter, i.e., whether the use of the rat itself was sufficiently coercive to render it more like picketing than handbilling.

The question is whether the rat is pure communication, like handbilling, or a more confrontational call for sympathetic action, like picketing.

Confrontational Rat

Recently, an administrative law judge found that the rat constituted unlawful secondary picketing, even where unaccompanied by any other confrontational conduct.[25] The case arose when the rat was posted, accompanied by peaceful handbilling, at a non-union construction project at a residential housing development on Long Island called "The Ranches at Mt. Sinai."

Region 29, which covers Brooklyn, Queens and Long Island, issued a complaint under §§8(b)(4) and (7). The union moved for summary judgment, arguing that its activities were protected by the First Amendment. The general counsel specifically requested the opportunity to present evidence that the rat is commonly understood in the construction industry to communicate the exact same message as picketing. The board obliged, denying the motion and remanding for a hearing.

At the hearing, several witnesses not directly involved in the dispute testified regarding the common understanding of the meaning, purpose and effect of the rat as an equally confrontational substitute for traditional group picketing. The union offered contrary evidence that the rat is frequently used at public demonstrations and, in conjunction with the handbills, was only intended to attract and inform the public about the non-union contractor's sub-standard work. The judge ultimately agreed with the employer, finding that the use of the rat was confrontational conduct—a signal that there was an "invisible picket line"—intended to persuade neutral third parties not to do business with the contractor. The judge also noted that the large size of the inflatable rats used—15 and 30 feet tall— "accentuated the confrontational nature" of the union's conduct. Accordingly, he found that the union had violated both §8(b)(4) and (7).

Many of these cases involving the rat settle once the Region issues a complaint. In this way, the act of filing a complaint itself can effectively set the boundaries on how the rat is used. But the board may yet have an opportunity to address the issue squarely, particularly if the union files exceptions with the board to the recent decision in the case involving the Ranches at Mt. Sinai.

1. Geraldine Baum, "You Dirty Rats! (Unions, however, love their vermin)," L.A. Times, Dec. 23, 2002,. at Part. 5, page 1.

2. Jesse McKinley, "The Theater Walkout: Scene; Audience Finds Broadway Drama on the Street," New York Times, March 8, 2003, at Section B, page 22.

3. Hugh Son, "Union protesters ask 'Y' Groundbreaking ceremony," Daily News, Dec. 2, 2003, at Suburban, page 1.; Tara Bahrampour, "With Rezoning and Labor Tension, An Inflated Rat Comes Calling," New York Times, July 13, 2003, at Section 14, page 6; Amanda Harris, "Center of Campus is Center of Storm; Despite years of planning, still no student union," Newsday, May 2, 2001, at page A43.

4. "A Giant of Labor is Released", New York Times, May 15, 1999, at Section B., page 6.

5. *Int'l Union of Op. Eng., Local 150 v. Village of Orland Park*, 139 F. Supp. 2d 950, 958 (N.D. Ill. 2001) ("The rat has long been a symbol of labor unrest.") (citing Oxford English Dictionary 2480 (4th Ed. 1993) (defining a "rat" as "a worker who refuse to join a strike or who takes a striker's place.")

6. Laborers Local 79 (DNA Contracting), 338 NLRB No. 153, fn. 4 (2003) ("In the building trades, a 'rat' sometimes refers to a nonunion contractor."); *San Antonio Comm. Hosp. v. Southern Calif. Dist. Council of Carpenters*, 125 F.3d 1230, 1236 (9th Cir. 1997) ("Most dictionaries, the Union points out, define 'rat' not only as a type of rodent, but also as an employer who fails to pay prevailing wages or a worker who works for substandard wages.")

7. 29 U.S.C. §158(b)(7) (2003).

8. Chicago Typographical Union No. 16 (Alden Press), 151 NLRB 1666, 1669 (1965) (quoting *NLRB v. United Furniture Workers*, 337 F.2d 936, 940 (2d Cir. 1964)).

9. Jeddo Coal Co., 334 NLRB No. 86 (2001); The Telephone Man, 327 NLRB No. 113, fn.3 (1999).

10. *NLRB v. Fruit and Vegetable Packers, Local 760*, 377 U.S. 58, 68 (1964); Aero Sonics Inc., 321 NLRB No. 79 (1996).

11. New Beckley Mining, 304 N.L.R.B. 71 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992) (picketing found where union protested with 50-140 union supports who shouted at replacement workers).

12. Hoffman Constr., 292 N.L.R.B. 562 (1989) (violation of 8(b)(4) found where union offered support and told neutral employees that a job action on their part was sanctioned).

13. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Trades Council*, 485 U.S. 568, 578-86 (1988) (peaceful handbilling did not have a coercive effect on the target employer's customers and did not violate §8(b)(4)).

14. Timothy F. Ryan and Kathryn M. Davis, "Banners, Rats, and Other Inflatable Toys: Do They Constitute Picket Activity? Do They Violate Section 8(b)(4)?," 20 The Labor Lawyer 137, 144-45 (2004).

15. Sheet Metal Workers Local 19 (Delcard Assoc.), 316 NLRB 426 (1995).

16. Sheet Metal Workers' International Association, Local 15, 12-CC-1258, 2003 NLRB GCM LEXIS 62 (April 4, 2003).

17. Sheet Metal Workers' International Association, Local 15 (Brandon Regional Medical Center), 12-CC-1258, 2004 NLRB LEXIS 688 (Dec. 7, 2004).

18. Laborers Local 79 (Calleo Development Corp.), Case No. 2-CC-2542-1 (April 10, 2002).

19. Bricklayers, Local 1 (Yates Restoration Group), Case No. 2-CC-2594 (July 22, 2003).

20. Bricklayers, Local 1 (Yates Restoration Group), Case No. 2-CC-2594 (Jan. 29, 2004 letter from Regional Director dismissing the charge).

21. Hampshire House, 2-CC-2581, 2003 NLRB GCM LEXIS 85 (June 25, 2003).

22. Laborers Local 78 (Café Centosette), Case No. 2-CC-2595 (Aug. 25, 2003).

23. Bricklayers Local 1 (Richardson & Lucas), Case No. 2-CP-1039 (Jan. 16, 2004).

24. Laborers Local 78 (River Terrace Associates), Case No. 2-CC-2627, 2-CP-1054 (Feb. 24, 2005).

25. Laborers Eastern Region Organizing Fund (The Ranches at Mt. Sinai), 29-CC-1422, 29-CP-662, 2005 WL 1467350 (Jun. 14, 2005).