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An Analysis of Recent Developments & Trends

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Union "Funeral Procession" Violates Secondary Boycott Law - Are Rats and Banners Next?

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Summary: Having ruled mock funeral processions are unlawful secondary boycotts, the NLRB is poised to decide whether two other union tactics - displaying giant inflatable rats and large banners - violate the secondary boycott law.

It is a cornerstone of our national labor policy that a labor union cannot lawfully threaten, coerce or restrain a neutral employer to force it to stop doing business with the union's real target, known as the "primary" employer. This cardinal principle of American labor law is enshrined in the secondary boycott statute, Section 8(b)(4)(B) of the National Labor Relations Act (NLRA).

The classic form of coercion exerted by unions against neutral employers is picketing, which is clearly unlawful when used to apply secondary pressure. In contrast, handbilling is deemed to be a mere expression of free speech and not coercive conduct, even when the union has a secondary objective. For example, if a company retains a nonunion contractor to remodel a store, a construction union that objects to the use of that contractor cannot indirectly pressure the contractor by picketing with signs that identify the store as the employer with which it has a dispute. However, the union can lawfully engage in handbilling in front of the store to protest the use of the nonunion contractor.

In recent years, unions have developed several novel tactics in an attempt to pressure neutral employers without crossing the line into the forbidden realm of coercion. Whether these tactics are lawful is discussed below.

"Grim Reaper" Meets His Demise at the Labor Board

One of the tactics used by unions to pressure neutral employers is conducting a mock funeral procession in front of an employer's facility. This type of activity is sometimes referred to as "street theater." The procession includes a fake casket, a "grim reaper" carrying a scythe, and accompanying funeral music. The neutral employer in this scenario is typically a hospital. By implying that patients admitted to the hospital are likely to leave in a casket, the union applies pressure on the hospital to stop doing business with a nonunion contractor.

Both the National Labor Relations Board (NLRB or "the Board") and the Eleventh Circuit Court of Appeals have recently come down hard on this type of union abuse. In *Sheet Metal Workers Local 15*, 346 NLRB No. 22 (2006), the NLRB unanimously held that conducting a mock funeral procession in front of a Florida hospital was a form of picketing in violation of the secondary boycott law. The Eleventh Circuit reached the same conclusion in a related case, *Kentov v. Sheet Metal Workers Local 15*, 418 F.3d 1259, 1265 (11th Cir. 2005), affirming the interim injunction granted by the federal district court to the hospital enjoining the union from engaging in that activity, on the ground that the funeral procession was a "functional equivalent of picketing" and that like traditional secondary picketing, the union's procession was a "mixture of conduct and communication" intended to provide the most persuasive deterrent to third persons about to enter the hospital.

Giant Union Rat May Have Its Own Funeral

A second union tactic used to pressure neutrals is inflating a giant rat balloon on public property in front of an employer's facility. This is ostensibly done because unions consider an employer that chooses to conduct its business without union involvement to be a "rat" employer.

The union used this tactic in addition to the mock funeral procession in the Florida case discussed above.

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It erected a 16-foot tall rat balloon directly in front of the hospital's main entrance. The NLRB found it unnecessary to decide whether this conduct was unlawful because it found the union guilty of a secondary boycott violation as a result of the funeral procession. The administrative law judge (ALJ) who initially decided the case under the Board's procedure, however, found that erecting the rat was a separate violation of the secondary boycott law. Moreover, the Eleventh Circuit relied on this part of the ALJ's decision in finding that the union had a "track record" of engaging in secondary pressure against the hospital. Thus, there appears to be a good chance that in a later case the NLRB also will find that displaying a giant union rat in front of a neutral employer's facility is a secondary boycott violation.

In the Board's latest case raising this issue, decided by the same panel that decided *Sheet Metal Workers Local 15*, the ALJ found that the display of giant union rats to pressure neutral employers at three separate jobsites amounted to picketing in violation of the secondary boycott law. *Laborers Organizing Fund*, 346 NLRB No. 105 (2006). The Board again sidestepped the issue of whether displaying the rats was a form of picketing or other coercive activity. However, the panel found that the union agents committed a secondary boycott violation when they "patrolled" the area in front of the jobsite entrances by walking back and forth, because in doing so, the agents "marked their territory, creating a barrier" at the entrances that could be viewed as a form of picketing.

NLRB Chairman Battista and Member Schaumber emphasized in the Laborers case that, while the picketing in that case involved patrolling, neither patrolling alone nor patrolling combined with the carrying of placards are essential elements to a finding of picketing, and that the essential feature of picketing is the "posting of individuals at entrances to a place of work." They also stressed that other conduct, apart from patrolling with placards, can be activity that constitutes picketing, or at least "restraint or coercion," under the secondary boycott statute. However, Member Liebman asserted that picketing is defined not by the mere presence of individuals, but by conduct that results in a "coercive confrontation."

A different analysis was applied in another recent case, *Tucker v. City of Fairfield*, 398 F.3d 457 (6th Cir. 2005), where the Sixth Circuit Court of Appeals held that erecting a similar rat balloon on public property in front of an employer's facility was an expression of free speech and thus could not be enjoined as a violation of a city ordinance prohibiting such displays. That case, however, did not involve the secondary boycott statute or the NLRB's unfair labor practice procedures.

Will Union Banners Aimed at Neutral Employers Survive as Free Speech?

The third union tactic used to pressure neutral employers is displaying a large banner in front of the employer's facility. The banner communicates a confrontational message aimed at the neutral employer. Typically the message states, "Shame on [name of neutral employer]," and conveys the impression that the neutral employer is engaged in a labor dispute. Union representatives hold the banner in a stationary position, but unlike the mock funeral procession described above, they do not patrol in front of the facility.

The issue raised by this tactic is whether the bannering is akin to picketing – or in some other manner "coercive" under the secondary boycott law – or whether it is more like handbilling, and thus a form of protected free speech. This issue is now pending before the NLRB in several cases that have been decided by ALJs with inconsistent results. Some of the ALJs in these cases have found bannering to be picketing, while others have found it to be free speech.

The ALJs who consider bannering to be a form of free speech have emphasized that the individuals holding the banners remain stationary without patrolling in front of the neutral employer's facility and do not engage in assertive or aggressive behavior toward people entering the facility. Those arguments were rejected by the ALJ in *In re Local Union No. 1827, United Broth. of Carpenters and Joiners of America*, 2003 WL 21206515 (NLRB Div. of Judges, May 9, 2003), a well-reasoned decision now pending before the NLRB. Citing long-standing NLRB precedent, the judge relied upon the following factors to conclude that bannering is equivalent to unlawful picketing:

- the fact that the banner was essentially fixed and not used in patrolling did not materially affect its function as a visually dramatic notice that the union had a labor dispute with the named neutral employer;
- patrolling with or without placards has never been essential to a finding of picketing;
- the essential feature of picketing is the placement of individuals at workplace entrances; and
- confrontation in the sense of assertive or aggressive behavior is not a necessary element of picketing.

In contrast, several federal courts have found bannering to be an expression of free speech, instead of picketing, when they have been asked to grant interim injunctive relief to employers. The Ninth Circuit Court of Appeals reached this conclusion last year in *Overstreet v. United Brotherhood of Carpenters Local 1506*, 409 F.3d 1199 (9th Cir. 2005), although in doing so the court disregarded an earlier decision in which it held that a hospital was entitled to an injunction against union bannering because it was defamatory and not an expression of free speech. The federal court decisions, however, have focused primarily on the principle of free speech in the abstract and have not adequately taken into account the secondary boycott law precedent discussed above.

The issue squarely presented by the banner-

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ing cases, which is noted but left unresolved by the Board in *Sheet Metal Workers Local 15*, is whether a barrier – physical or symbolic – is a necessary prerequisite to finding that particular conduct is equivalent to picketing and thus a violation of the secondary boycott law. Board Member Liebman asserted in a concurring opinion in *Sheet Metal Workers Local 15* that a barrier must exist before conduct can be deemed picketing, while Chairman Battista and Member Schaumber refused to so find, instead holding the issue open for later resolution and stating, "it may be that other conduct, short of a barrier, can be 'conduct' that is picketing or at least 'restraint or coercion' in violation of the Act."

With the recent recess appointments of Peter Kirsanow and Dennis Walsh, the NLRB now has a full five-member complement, and the stage appears to be set for a decision that will establish an important precedent on the bannering issue. Employers are hopeful that the Board will treat this as a priority issue during the next few months and that it will conclude that secondary bannering is indeed the equivalent of coercive picketing against neutral employers in violation of the secondary boycott law.

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