SEBRIS | BUSTO | JAMES

425-454-4233
sebrisbusto.com

Employment Law Note

June 2019

Rats, and Cats, and Banners (Oh My!)

By Judd H. Lees, jlees@sebrisbusto.com

The hoped-for "Trump effect" appears to be in play and is pushing the National Labor Relations Board ("Board") pendulum back toward the management side of the equation after the Obama years. Among the changes on the horizon are a thawing of the definitions of "joint employer," "independent contractor," and "protected, concerted activity," as well as anticipated changes to the "quickie election" rules implemented by the Board. The May 14 release of nine memos from the Division of Advice revealed several employer-friendly positions, including one that Uber drivers are not "employees" but are "independent contractors." This article will examine one of the significant Advice Memos addressing so-called secondary activity at construction sites, specifically organized labor's use of inflatable rats, cats and banners.

Ever since organized labor's failure to convince Congress in the 70's to allow "common situs" picketing to bring construction projects to a halt with a single picketer, unions have attempted to get around proscriptions on so-called "secondary activity" in order to bring secondary or neutral owners and contractors directly into the union's line of fire aimed at a targeted subcontractor. Dual gating, which allows the targeted company to designate an entrance and force the union to picket at that entrance and leave all other neutrals alone, has effectively neutralized organized labor's ability to pressure neutrals.

One colorful device unions have come up with is the use of inflatable rats (representing the "rat-like" open shop contractor), and inflatable fat cats (ostensibly representing cheating owners) to signal to union members to leave the jobsite despite the absence of traditional picketing. This law firm has successfully convinced the Region on a number of occasions that such devices are mere "signal pickets" which are subject to dual gating and the other rules applicable to traditional picketing, but these colorful devices are still popular.

Another, more problematic, device utilized primarily by the Carpenters Union has been the banner. Rather than rely on small picket signs to reach workers and the public, the union creates a 20-foot banner which in large letters casts "shame" on a third party based on a labor dispute. The remarkable characteristics of such banners are: (1) they are much larger than pickets and are therefore more visible to the public and employees; (2) they take up quite a bit of space and therefore potentially block more people than a single picket; (3) they typically name the "neutral" owner rather than the targeted company, thus giving the public the misimpression that the dispute is with the owner; (4) they do not identify the target company with whom they really have the dispute; and (5) the union claims that banners constitute speech, rather than picketing, and are therefore not subject to dual gating or other restrictions on picketing. What is even more remarkable is that, ultimately, the Board and most courts have *agreed* that banners are not pickets. Instead, bannering is treated as free speech not subject to restrictions on picketing, such as dual gating, the requirement that the target company be on site in order to banner, and the requirement that the object of the activity be clearly identified. In other

words, unions are free to create the misimpression that it is the owner—rather than the targeted subcontractor—who has provoked the labor dispute.

This state of affairs may all change based on the guidance provided by the Division of Advice. According to the Division of Advice, a banner accompanied by an inflatable cat may "create[] a symbolic, confrontational barrier" which is "tantamount to picketing." If considered picketing rather than speech, then the whole union cat, rat, banner circus may have to be confined to the gate reserved for the targeted company and only be present when any worker or manager of the targeted company is present. The Division of Advice also opined that banners falsely suggesting that the dispute is with the owner rather than the targeted company do not constitute protected speech since they are at best misleading and, at worst, false.

As a result, contractors subject to any of the colorful devices used by unions to generate work stoppages without traditional "picketing" may now have a friend in the National Labor Relations Board. If and when an inflatable rat shows up, especially if it is near the neutral gate, and especially if the targeted company is not present on the jobsite, employers can and should file a secondary boycott charge with the Board. The Board should, based on the recent memo authored by the Division of Advice, deflate the "signal picket" and send it scurrying back to its hole. Similarly, in the event a large banner shows up and the "shaming" of the banner is directed at a neutral owner or contractor, a charge should be filed with the Board and injunctive relief requested. The colorful days of jobsites full of rats, cats and banners may soon be coming to a close.

We publish the Employment Law Note to inform clients and friends of developments in labor and employment relations law. This Note is not intended, nor should it be used, as a substitute for specific legal advice or opinions. Legal counsel can be given only in response to inquiries regarding particular factual situations. © 2019 Sebris Busto James. All rights reserved.