



# Scabby The Rat to Remain a Fixture at Union Protests

Insights

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In a 3-1 decision, the National Labor Relations Board (NLRB) has ruled that unions may continue deploying “Scabby” the inflatable rat and similar balloons at demonstrations against non-union businesses.

The board considered former NLRB General Counsel Peter Robb’s argument that the inflatable rat represented unlawful and coercive secondary activity threatening customers and other neutral parties.

## Background

The Board’s decision in *Lippert Components, Inc.*, 371 NLRB No. 8 (2021), arose from an unfair labor practice charge directed at a union that placed Scabby outside an Indiana RV show in 2018. The demonstration, led by International Union of Operating Engineers Local 150, was directed at a supply company over alleged safety violations involving one of its contractors. An administrative law judge had previously upheld the conduct on the basis that it “in no way caused a confrontation” that could have wrongfully intimidated customers.

Republican NLRB members John Ring and Marvin Kaplan joined Chair Lauren McFerran, the board’s sole Democrat, in dismissing the case. The majority found that Local 150’s use of Scabby and two stationary banners was lawful under the National Labor Relations Act.

McFerran wrote a concurrence stating that dismissal was compelled by prior NLRB precedent. In support of her position, she cited the Board’s prior rulings in *Carpenters Local 1506 (Eliason & Knuth)* and *Sheet Metal Workers Local #15 (Brandon Regional Hospital)*, which upheld the use of banners and a rat balloon at secondary protests and demonstrations.

As a result of this decision, Scabby is destined to remain entrenched as a familiar figure at union protests for the foreseeable future. What do employers need to know about this latest development?

## The Life And Times Of Scabby The Rat

For over three decades, Scabby the Rat has been a fixture at demonstrations staged by organized labor and a thorn in the side of targeted businesses. The NLRB had traditionally upheld this confrontational tactic as a permissible form of union protest.

That stance shifted under the Trump administration, as the NLRB considered cracking down on the use of the giant rat. Prior to his ouster, former NLRB General Counsel Peter Robb suggested that utilizing Scabby to scare customers away from neutral businesses “secondary” to an underlying labor dispute may violate federal labor law.

But the Biden administration replaced Robb with Acting General Counsel Peter Sung Ohr, who returned the agency to a more tolerant posture with respect to Scabby the Rat and other confrontational union tactics. Since his appointment, Ohr has referred a pair of Robb-era unfair labor practice complaints against Scabby back to their respective Regions for possible dismissal. The move came just days after Ohr rescinded a number of guidance and operational memoranda issued under Robb’s tenure as General Counsel.

### **Recent Use of Scabby Took Center Stage**

Robb had previously prosecuted unions for unleashing the rodent at demonstrations against neutral employers on the basis that they were engaged in unlawful secondary picketing rather than protected speech. The complaints asserted that the inflatable rat was being used to menace, intimidate, and coerce employers in furtherance of an unlawful purpose.

Another pending Board case had involved picket activity directed at a Philadelphia hotel in 2018. The union, International Brotherhood of Electrical Workers Local 98, was accused of displaying two inflatable rats in the course of its picket activity but denied resorting to coercive tactics.

Ohr had previously contended that pursuit of these complaints was not “in the public interest” and otherwise represented an inefficient use of NLRB resources. Because the litigation was already initiated, however, Ohr lacked authority to withdraw the cases on his own.

### **What’s Next – And What Should Employers Know?**

Scabby the Rat will likely remain a fixture at labor disputes for the duration of the current administration. As a result of this decision, employers can expect an uptick in use of the inflatable rats (and in picket activity generally), in an effort to further union organizing objectives and stem the tide of union membership decline.

Should you encounter such tactics, we would encourage you to work closely with your Fisher Phillips counsel (or any member of our Labor Relations Practice Group) to formulate a lawful and effective strategy to protect against any corresponding business disruption. Fisher Phillips will continue to monitor any further developments in this area as they occur, so you should ensure you are subscribed to Fisher Phillips’ Insight system to gather the most up-to-date information.

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