

NLRB Judge Clears 'Scabby' But Extermination Still Possible

By [Braden Campbell](#)

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Law360 (May 29, 2019, 6:14 PM EDT) -- The [National Labor Relations Board](#) may soon have a chance to shoo Scabby the Rat after an agency judge teed up the question of the critter's legality by ruling that a union didn't violate federal labor law by deploying the well-known labor protest symbol outside a Philadelphia hotel.

The allegations that [International Brotherhood of Electrical Workers Local 98](#) coerced the public by handbilling beside inflatable rats outside the Fairfield Inn & Suites in downtown Philly are similar to those in a recent dispute between IBEW and a Chicago builder. The Windy City conflict prompted a high-ranking attorney at the NLRB's headquarters in Washington, D.C., to [recommend the board jettison precedent](#) protecting Scabby-aided protests.

Attorneys in the NLRB General Counsel's Office had argued Local 98 violated the National Labor Relations Act by "coercing" the public not to do business with the Philadelphia hotel, which the union had attacked for hiring a nonunion contractor for renovations. Administrative Law Judge Robert Giannasi rejected these arguments Tuesday, saying the protest wasn't an illegal "secondary picket" because the rat was First Amendment-protected "speech in another form."

"At its essence, [Local 98's] protest activity ... amounted to peaceful handbilling, which, under the Supreme Court decision in [[DeBartolo Corp. v. Gulf Coast Trades Council](#)], is protected and lawful," Judge Giannasi said, citing a 1988 [U.S. Supreme Court](#) ruling allowing peaceful union demonstrations outside "neutral" or secondary employers, which are those whose workers the union doesn't represent.

The Philadelphia hotel, whose case the GC argued, can appeal Judge Giannasi's decision by filing "exceptions" with the board. That would give the Republican-controlled board a chance to review precedent drawing lines under the NLRA between legal protests and so-called

secondary pickets, which are those in which a union "threatens, coerces or restrains" the public from patronizing a neutral employer.

The hotel's attorney, Wally Zimolong of Zimolong Law, told Law360 on Wednesday he plans to challenge the ruling.

"We're confident the current board will agree with us that the current law should be overturned," Zimolong said. An NLRB representative did not say Wednesday whether the GC's office would likewise appeal.

An attorney for Local 98 did not immediately respond Wednesday to a request for comment.

An attorney under the board's President Donald Trump-appointed prosecutor took aim at Scabby late last year in a recently unveiled advice memo, which is a form of guidance the Division of Advice in the board's central office provides regional agency officials in certain cases.

Advice head Jayme Sophir told the director of the board's Chicago office to file suit alleging Chicago-based IBEW Local 134 violated the NLRA by deploying an inflatable "fat cat" beside banners outside a construction site operated by Summit Design & Build, whose workers the union did not represent.

Sophir also urged the Chicago office to recommend that the board reconsider a trio of Obama-era rulings that loosened the reins on union protests by narrowing what the agency views as coercive picketing. The case settled early in litigation, so it did not reach the board.

Judge Giannasi cited two of the decisions Sophir urged the board to overturn. In *Eliason & Knuth of Arizona*, the board said a protest in which a union passed out pamphlets and displayed a banner shaming a secondary employer was not a picket because it did not block the worksite or otherwise create a confrontation between protesters and the employer. In *Brandon Medical*, the board said the same of a similar protest involving an inflatable rat.

Judge Giannasi said Local 98's protest was similar to those the board allowed in *Eliason* and *Brandon Medical* because it used Scabby to underscore its protected pamphleting.

"Neither the placement of the rats, which were always on public sidewalks, nor the [union's] activity in connection with the rats amounted to picketing or coercion within the definition of those terms as set forth in *Eliason* and *Brandon II*," Judge Giannasi said.

However, Judge Giannasi said Local 98 violated the NLRA through another protest in which a union official used a bullhorn to amplify attacks against the hotel. This protest was "excessively loud and amounted to unlawful coercion" because hotel guests could hear it and complained about it, the judge said.

The union is represented by William Josem and Cassie Ehrenberg of [Cleary Josem & Trigiani LLP](#).

The hotel is represented by Wally Zimolong of Zimolong Law.

The GC is represented in-house by Lea Alvo-Sadiky.

The case is IBEW Local 98 and Shree Sai Siddhi Spruce LLC d/b/a Fairfield Inn & Suites By Marriott, case number 04-CC-223346, before the National Labor Relations Board Division of Judges.

--Additional reporting by Vin Gurrieri. Editing by Orlando Lorenzo.

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