International Union of Operating Engineers, Local Union No. 150 (Lippert Components), Inc., 371 N.L.R.B. No. 8 (2021)

Chapter 10, Section 4, Note 6 (p.608). Add the follow to the end of Note 6:

Later, during the Trump Administration, former NLRB General Counsel Peter Robb argued that a union's use of inflatables like Scabby violated Section 8(b)(4). The NLRB sought amicus briefs on whether to agree with the General Counsel's position and to overturn *Eliason & Knuth* and related precedent. However, by a 3-1 vote—with two Republican Board Members in the majority—the NLRB concluded in *International Union of Operating Engineers, Local Union No. 150 (Lippert Components), Inc.*, 371 N.L.R.B. No. 8 (2021) that Scabby did not violate Section 8(b)(4). The basic holding of the case is that "displaying banners or an inflatable rat near the entrance of a neutral employer, without more, does not 'threaten, coerce, or restrain' the neutral [employer] in violation of Section 8(b)(4)(ii)(B)." As a result, unions are free to use Scabby and other inflatables at neutral sites as long as they do not obstruct entrances or engage in other improper activity.

A major part of the NLRB's rationale was that *Eliason & Knuth* applied to inflatables, although the Board members differed in their agreement with certain aspects of that decision. It is worth reading the concurrence by Members Kaplan and Ring for its summary of several of the major cases discussed in this Chapter, such as *Denver Building & Construction Trades*, *Safeco*, *Tree Fruits*, and (especially) *Debartolo II*.

Chapter 3, Section 3 Problem #3 (p.171), and Note 2 (p.183). Add the following to the end of Note 2:

Recently, the NLRB issued *International Union of Operating Engineers, Local Union No. 150 (Lippert Components), Inc.*, 371 N.L.R.B. No. 8 (2021), in which it concluded that a union's peaceful use of Scabby is not a ULP under Section 8(b)(4), which is discussed in Chapter 10. Because *Lippert Components* was a union ULP case, it does not speak directly to whether Scabby or other inflatables might lose protection under Section 7. That inquiry remains focused more on the substance of the message that accompanies the inflatable and whether that message was disloyal. However, *Lippert Components* provides a few useful reminders. The first thing to remember is the difference between unlawful activity and unprotected activity. In other words, just because a union's use of Scabby may not be unlawful under Section 8(b)(4) doesn't mean that employees use of the inflatable is protected under Section 7. As a result, if Scabby was found to be unprotected, involved employees would have no legal protection against retaliation. Second, the significant First Amendment issue at play in *Lippert Components* loses its punch in a concerted and protected Section 8(a)(1) case. The reason for this difference is that in a Section 8(b)(4) case the government (the NLRB) is finding expressive activity to be unlawful. In contrast, the Section 8(a)(1) case addresses a private actor's (the employer's) retaliation against employees' expression and whether that retaliation should be considered unlawful. Third, Scabby is a good illustration of the fact that a single action—such as displaying an inflatable as part of a labor protest—can result not only in multiple issues, but even separate cases brought against different entities (the union and employer).