Labor & Employment Issues
In Focus
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For Clients and Friends
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LABOR DIVIDED – NEW BATTLEFRONT: HUDSON YARDS

"I can hire one half of the working class to kill the other half"
--attributed to Jay Gould, American financier

In the most recent blow to labor union solidarity and unity, the parent union of a local union representing ironworkers in New York City fired the local union's entire leadership for refusing to tell its members to cross a picket line. The International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers ("International") on February 19, 2019 fired the leadership of Local 46, a local labor union affiliated with the International and which represents New York City ironworkers. The International fired Local 46's Business Manager and told all other officers that they would have to re-apply for their jobs. In a letter to Local 46 members, the International declared that it was placing Local 46 in trusteeship, all Local 46 offices were vacant and suspended all membership and executive committee meetings. The International also appointed someone to administer Local 46's affairs.

This dramatic sign of labor discord stems from the International Union siding with giant real estate developer the Related Companies ("Related") in a bitter labor dispute with New York City's building trades unions over the massive real estate project known as Hudson Yards on New York City's West Side. Specifically, Related is at odds with the Building and Construction Trades Council of Greater New York ("BCTC"), an umbrella organization of New York City building trades unions, over whether the second phase of Hudson Yards should be built under a project labor agreement, as was the first phase of Hudson Yards. Such agreements typically benefit both sides by preserving labor harmony, eliminating work jurisdictional disputes, increasing productivity under flexible work rules, and ensuring that all construction is built safely and correctly by union labor.

Related, however, doesn't want such project labor agreement and, instead, wants to use more non-union labor at Hudson Yards. Such dispute has led to picketing by many of the BCTC affiliated labor unions, including Local 46, at Hudson Yards. Such picketing reflects the growing energized solidarity of local labor unions which has been further fueled by the #countmein movement.

Related on the other hand, has ramped up the bitterness in the dispute by bringing a lawsuit against the BCTC. The BCTC unions, however, like Local 46 and The Cement and Concrete Workers District Council, have held firm and continued to picket.

Now, the International has stepped into this local fight by cutting a deal with Related and taking over Local 46 when its members refused to cross a picket line at Hudson Yards. Such step threatens to further divide labor leaders and make rank and file union members who believe in this new energized labor solidarity feel betrayed. One thing is for certain, this step by the International is going to resonate with the buildings trades unions and the labor movement that

large national companies can diminish and weaken unions in labor disputes by pitting one union against another, international vs. local, trade vs. trade.

APPELLATE COURT RULES THAT POLICE BODY CAMERA VIDEO MAY BE PUBLICLY DISCLOSED

In a decision which attempted to balance the public's right to know against the privacy rights of public employees' personnel records, a New York Appellate Division panel has held unanimously that police body camera footage is subject to public disclosure under state law. The Supreme Court of the State of New York Appellate Division for the First Department held, in a case entitled *Patrolmen's Benevolent Association vs. De Blasio*, 150181/18 (1st Dep't 2019), that such footage doesn't constitute a personnel record and therefore isn't covered by a law that keeps such records secret. The City's largest police union opposed the release of body cam footage on the basis of privacy and safety concerns of its members and is considering an appeal to the state's highest court, the Court of Appeals. The City of New York was supported in the case by various major news organizations as *amici curiae*.

The law had first come into effect with the release of body camera footage in September 2017 when a 48-minute video showed the fatal shooting of Miguel Antonio Richards, of the Bronx, after he threatened officers with a knife and a fake gun. Subsequently, the appeals court halted the release of footage in July 2018 while it considered this case. Specifically, the Court was considering whether the city's release of the footage violated state Civil Rights Law 50-a — which bars the release of an officer's personnel record. The Court ruled that edited portions of the footage could be made public without a hearing. The Court wrote, "we find that given its nature and use, the body-worn-camera footage at issue is not a personnel record covered by the confidentiality and disclosure requirements … the purpose of body-worn-camera footage is for use in the service of other key objectives of the program, such as transparency, accountability, and public trust building."

In response, PBA President Patrick Lynch said, "we believe that the court's decision is wrong, that it will have a negative impact on public safety and on the safety of our members. We are reviewing the decision and assessing our options for appeal." Meanwhile, City Councilman Donovan Richards, a Democrat from Queens who heads the council's Public Safety Committee, praised the ruling as bringing greater transparency and revealing "patterns of misconduct." NYPD Commissioner James O'Neill also applauded the decision. "This ruling is an important step forward for transparency and affirms what the NYPD believes – not only is the public entitled to this information, but this footage overwhelmingly shows just how brave, skilled and dedicated our cops are every single day in the service of the people of New York City," O'Neill said in a statement. A panel created by O'Neill last year concluded that the NYPD was policing itself with "almost a complete lack of transparency and public accountability."

In its ruling, the panel said the PBA has "valid concerns" about privacy but the Court was reviewing a larger policy picture. A ruling in favor of the PBA could be interpreted to expand to "arrest reports, stop reports, summonses and accident reports, which clearly are not in the nature of personnel records so as to be covered by 50-a," the panel wrote. The case is almost certain to go to the Court of Appeals, where the PBA will have another chance to gain at least limited protection for its members.

RATS! ROBBED AGAIN?
SCABBY CAGED IN SEVENTH CIRCUIT FOR NOW

On February 14, 2019, the United States Court of Appeals for the Seventh Circuit held that a Wisconsin town ordinance used to remove a Scabby the Rat did not violate the First Amendment. *Construction and General Laborers Union No. 330 v. Town of Grand Chute*, No. 18-1739 (7th Cir. Feb. 14, 2019). The ruling takes on greater significance given NLRB General Counsel Peter Robb's pursuit of a ban on the inflatable in a case pending in Illinois district court. *Ohr v. IUOE Local 150*, 18-cv-08414 (N.D. Il). Ultimately, however, the Seventh Circuit did not provide Robb any support, in fact hinting at the opposite.

In 2014, Local 330 learned that a masonry company doing work at a Toyota dealership was not paying area standard wages and benefits. Local 330 decided to engage in informational picketing, setting up a 12-foot Scabby along a major local road across from the car dealership. After receiving notice, the Town Code Enforcement Officer ordered the Union to remove Scabby pursuant to a local ordinance banning all private signs from public roads. In 2015, the Town amended this ordinance, adding an exception for Town approved signs and a separate section on inflatables that was not expressly limited to public property.

Judge Wood explained that even First Amendment protected speech in a public forum may be restricted if the restriction is content-neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative ways to communicate the desired message. Further, a restriction cannot be selectively enforced, permitting messages the Town approves while enforcing it against unions and other unpopular speakers. Reviewing the 2014 Ordinance, the Court first noted that "there is no doubt that a union's use of Scabby to protest employment practices is a form of expression protected by the First Amendment. Rats, as the manufacturer attests, 'Get Attention.'" Nevertheless, the Court concluded that the 2014 Ordinance banning all private signs on public roads to prevent distracted drivers was comprehensive, content neutral, and evenhandedly enforced, and therefore not in violation of the First Amendment.

With respect to the 2015 Ordinance, the Court concluded that because the Union did not protest under the new law, the controversy was not ripe. The Court, in dicta, specifically highlighted the differences in the 2015 Ordinance. It also recognized that the Town was enforcing an unwritten holiday decoration exception to the 2015 inflatables restriction. The Court delivered a clear warning, stating that "if Santa is sending a message about celebrating the Christmas holiday, or Spiderman is some form of commercial speech touting a new movie release, the Town might have a hard time explaining why they are permissible and Scabby is not."

NLRB General Counsel Robb, meanwhile, seeks to enjoin IUOE Local 150 from engaging in an ongoing protest featuring Scabby. Robb alleges that Local 150 is violating the NLRA secondary boycott prohibition because, among other factors, Scabby converts an informational action into "coercive" picketing. As Robb acknowledges, NLRB precedent does not currently support his argument and he seeks the court's reversal of a couple Board decisions. But perhaps more interestingly, the Union raised a First Amendment defense. While the Supreme Court has previously limited the application of the First Amendment to secondary picketing, a body of case law spearheaded by anti-union groups to reduce regulation has expanded free speech principles so far that restrictions on union secondary speech may no

longer be sustainable. Judge Wood's comparison of Scabby to Spiderman arguably displays recognition of this point by the appellate court of the jurisdiction in which Robb's petition sits. Accordingly, this case warrants close monitoring, threatening to open the door to a new world of possibility for union action.

MAINTENANCE OF CHECKOFF PROVISION MAY BE MAINTAINED

Good news continues to issue from the bench of Judge Robert J. Bryan for AFSCME Council 28 ("Union"), most recently in his February 15, 2019 decision in *Belgau v. Inslee et al.*, 18-cv-05620-RJB (W.D. Wash. Feb. 15, 2019). Granting summary judgment in favor of the State of Washington and the Union, Judge Bryan dismissed claims by a putative class of AFSCME Council 28 members asserting that their First Amendment rights had been violated by the deduction of dues from their wages after the United States Supreme Court had issued its opinion in *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018).

In *Belgau*, the plaintiffs, unlike the plaintiffs in *Janus*, were Union members and had joined the Union voluntarily well before the *Janus* decision. Subsequent to having joined the Union, in July of 2017 and still prior to the *Janus* decision, these members voluntarily signed a new authorization card developed by the Union, which was not required to maintain membership in the Union and which contained a one-year dues payment commitment (commonly known as a maintenance of checkoff or maintenance of dues deduction authorization). Several days following the *Janus* decision, Washington State and the Union amended their collective bargaining agreement ("CBA") to cease the collection of agency fees from non-members. The amended CBA also included a dues checkoff provision for Union members and a procedure for a revocation of checkoff authorization, according to the terms of Union members' signed authorization cards. Following the issuance of the *Janus* decision, the *Belgau* plaintiffs notified the Union that they no longer wanted to remain members of the Union. Although their requests to withdraw membership were honored, terminating their membership rights and access to certain Union sponsored benefits, their employer continued to deduct an amount equal to dues from their wages and to remit it to the Union, in accordance with the one-year dues payment commitment provision of their 2017 authorization cards.

The District Court flatly rejected the plaintiffs' claims of any First Amendment violation for the continued deduction of dues consistent with their signed authorization cards, finding the authorization cards to be enforceable contracts between the Union and its members. Judge Bryan rejected plaintiffs' assertions that the 2017 authorization cards were invalid because the plaintiffs could not knowingly waive their First Amendment rights, as required by *Janus*, since they did not know of those rights yet: "*Janus* does not apply here – Janus was not a union member, unlike the Plaintiffs here, and Janus did not agree to a dues deduction, unlike the Plaintiffs here." Therefore, Plaintiffs remained bound to their one-year contractual commitment, ruled Judge Bryan, as he granted the Union summary judgment dismissing the action.

Loyal *In Focus* readers will recall that in our December 8, 2018 edition we reported on a favorable decision handed down by Judge Bryan in *Danielson v. Am. Fed'n of State, Cty. & Mun. Employees, Council 28, AFL-CIO*, 18-cv-05206- RJB (W.D. Wash. Nov. 28, 2018), finding that the good faith defense shielded AFSCME Council 28 from liability for the retroactive refund of agency fees collected prior to *Janus.* (See, "ROUND ONE IN 'JANUS II' GOES TO UNIONS – NO RETROACTIVE APPLICATION SAYS FEDERAL DISTRICT COURT,"

https://www.pittalaw.com/In-Focus-December-5-2018.pdf) We will continue to keep you advised of further developments in post *Janus* cases now hard fought across the country.

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

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