SMELL A RAT?

Is using an inflatable rat allowed under a "no strike" clause?

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FEAR THE RAT! Local 802 uses our inflatable rat to fight union busters.

I RECEIVED AN EMERGENCY phone call over Thanksgiving from a union client. Apparently, a musician had been hired to perform for a New Jersey theatrical production in violation of the first call rights of another musician. To add insult to injury, the contracted musician was at that time in bad standing with another AFM local (a situation that has since been corrected). My client retorted, "I'm pulling the musicians if this guy takes a seat in the pit on Friday." At the time I received the call, I was standing in a supermarket checkout line, purchasing food for Thanksgiving. Reflexively, at the top of my voice I yelled, "You can't do that! The employer will immediately receive a Boys' Markets injunction and they will sue the union for thousands of dollars in damages if the show goes dark." In a conversation that I assume has taken place literally hundreds of times between labor attorneys and their union clients, I explained the following points of law.

Most labor agreements contain a "no strike/no lockout" clause. The effect of this clause is to prohibit either the union from striking or the employer from locking out employees during the term of a binding collective bargaining agreement. In exchange for these guarantees of labor peace, the parties most often agree that disputes will be resolved through grievance and arbitration procedures rather than through economic warfare. In fact, the Supreme Court has held that the agreement to arbitrate a dispute is the quid pro quo for the no strike/no lockout obligation. In its leading decision, *Boys' Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970),* the Supreme Court held that a strike may be prohibited where a collective bargaining agreement contains a mandatory arbitration clause and the strike is over an issue or subject covered by that arbitration provision. (This decision presented itself as a narrow exception to the Norris-LaGuardia Act's prohibition on federal court's issuing labor injunctions during the course of a labor dispute.)

The upshot is: if a union strikes when it's not allowed, an employer may seek damages for any economic losses it may sustain.

But…with any general rule of law, there are exceptions! In a recent decision rendered by the U.S. District Court for the Eastern District of New York, the court highlighted in dramatic fashion a limited exception to the Boys' Markets decision. There are some occasions where a labor dispute involves subject matter *not* covered by the labor agreement's grievance and arbitration processes. In *Microtech Contracting Corporation v. Mason Tenders District Council of Greater New York, 14-CV-4179 (October 24, 2014)*, the union had placed an inflatable rat at a construction site at which Microtech was performing asbestos removal. The union was protesting the fact that Microtech had hired a supervisor who was also involved with operating a non-union construction company. This was clearly an issue not contemplated by the grievance machinery of the agreement and thus not bound by the union's no strike obligation. The rat was thus allowed to stand guard over the employer's operation and by virtue of the anti-labor injunction law, the employer's bid for an injunction was rejected .

One further point. The agreement between Microtech and the Mason Tenders had a provision that barred the union from "disrupting" the employer's business. Federal Judge Joseph Bianco held that the union had a First Amendment right to deploy the rat and that its presence had no observable effect on Microtech's operations at the construction site. The judge wrote that "though it appears that the inflatable rat may have an effect on Microtech's business relationships, plaintiff has not contended that the rat by itself has any effect on labor that would render this conduct similar to a strike, a walkout, or a picket line. "

This language is significant in the respect that it suggests that even if the dispute were subject to arbitration, deployment of the rat would not necessarily violate the union's no strike obligation.

Back to the beginning of my story. It's clear that the musicians can't strike in this case. That's because if an employer ignores the first call list, that's something that has to be grieved and arbitrated in the usual manner. You can't jump to a strike. But can the union deploy an inflatable rat?

Signs point to yes, but before I can totally recommend this, I want to wait to see if the Microtech decision survives the employer's inevitable appeal. However, I may want to inflate Local 802's rat once for good measure, just to make sure there are no holes in it and it's ready to use!