

CATS, RATS, COURTS, AND THE CONSTITUTION

By: Daniel Olson, Assistant Legal Counsel, League of Wisconsin Municipalities

A federal court decision might be notable simply because it begins with, “Rats. This case is about rats. Giant, inflatable rats . . . Cats too – inflatable fat cats, wearing business suits and pinkie rings, strangling workers.” *Constr. & Gen. Laborers’ Local Union No. 330 v. Town of Grand Chute, Wisconsin*, Case No. 15-1932 (7th Cir. Aug. 19, 2016). However, the substance of the decision, which addressed constitutional principles involved in a dispute between a labor union and municipality over enforcement of a sign ordinance against common union protest methods, is also noteworthy.

In early 2014 a construction union began to display a large inflatable cat and rat as part of an ongoing protest against the employment policies of a nearby construction site. Each morning, union members would inflate the rat or cat and stake it into the ground either approximately 70 feet from the street, or on a median between a service road and large avenue, and take it down each evening.

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A Town of Grand Chute ordinance forbade private signs on the public way, and defined signage broadly to mean any structure conveying a particular message. After complaints from the targeted business, the Town decided to enforce the ordinance forbidding private signs on a public way and demanded the union immediately remove the inflatable figures.

After the Town commenced an enforcement action against the union, a federal district court denied the union’s request for a preliminary injunction and granted summary judgment in favor of the town. The union then sought review in the Seventh Circuit Court of Appeals.

The Court discussed the basic validity of the town’s ordinance, citing to *Members of City Council of Los Angeles v. Taxpayers for Vincent* to support the position that a city may lawfully ban all private signs from the public way. But, the majority leaned in favor of the union’s argument that the ordinance’s enforcement had been discriminatory in application. Ultimately, the Court focused on whether the case was moot and decided that the case should be remanded to the district court.

The majority observed that since the district court’s summary judgment order, the union and employer had resolved their differences, ending the protest. The Town had also amended its sign code to change the definition of “sign.” And, lastly, the union had not provided sufficient information to indicate that the controversy is of the type likely to reoccur. Judge Easterbrook, writing for the majority, went on to note that the Town’s ordinances prohibiting private signage in the right-of-way are content neutral, but that there was not enough evidence on appeal to determine whether there had been selective enforcement.

The majority noted that cities can ban private signs on public ways, including signs expressing symbolic speech, so long as it does not discriminate against disfavored viewpoints. But the Town could be in trouble if it is selectively enforcing the ordinance that applies in the case. “If the ordinance *in operation* discriminates according to the content of speech, then only a compelling justification could save it, and the town has not argued that it has the sort of justification that would authorize content discrimination.”

Judge Posner, concurring and dissenting, agreed that the case should be remanded, but disagreed with the majority’s conclusion that the sign ordinance was constitutional. Posner noted several problems in the case.

Posner disagreed with the majority that the case was moot, since he found it likely that the rat would be used in future union protests in the Town, and that the Town would treat the rat in the same way it did in 2014. Posner also noted that the town’s enforcement action came only after the business that was being protested complained to the town, leading to selective enforcement concerns. Posner also questioned whether the rat’s location was even within the public right-of-way, and whether the inflatable rat was truly a threat to public safety as the Town asserted. In a particularly unusual move, Judge Posner made personal observations of similar protests in Chicago and argued that the inflatable figures did not cause a traffic safety hazard.

Although the court did not decide the merits of the case, private signage in public rights-of-way may be more secure following the decision. All three members of the Circuit’s

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panel expressed concern about the possibly discriminatory enforcement of the Town’s ordinance, which would almost certainly render the ordinance invalid because it would not be content neutral. Municipalities with similar sign ordinance restrictions must therefore enforce such ordinances in a non-discriminatory manner and apply the ordinance with equal vigor to church potluck signs, girl scout cookie sale signs and high school musical performance signs as it does to inflatable rats and cats and other signs in the public right-of-way.

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