

Scabby the Rat: Threatening Pest or Famous Labor Icon?

By Michael T. Mortensen

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Employers have at least one way to rid themselves of Scabby the Rat, a staple of labor union protest, following a decision from a federal appeals court upholding an ordinance enacted by the Town of Grand Chute, Wisconsin, banning anything placed on a public right-of-way that might obstruct vision or distract passing drivers. *Construction & Gen. Laborers' Union 330 v. Town of Grand Chute*, No. 18-1739 (7th Cir. Feb. 14, 2019). The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

For almost 30 years, unions have used the inflatable rat (complete with red eyes and an unnecessarily gross pink belly) to protest employers for using non-union labor or anything else the union deems objectionable. Despite employers' many efforts to exterminate the rat, Scabby has been a mainstay at rallies, protests, and strikes.

The Seventh Circuit said that, although it had "no doubt" the use of Scabby is a form of expression protected by the First Amendment, the law was valid because it was content-neutral, narrowly tailored to serve a significant governmental interest, and left open alternative ways for the union to communicate its message.

The Court also highlighted the importance of consistent enforcement as a basis of its decision. Successfully removing the inflatable rat or its friends, Fat Cat and Greedy Pig, will depend on a municipality's prior actions as the mere existence of an ordinance will not be enough.

At the federal level, the National Labor Relations Board General Counsel Peter Robb reportedly supports eliminating the unions' use of Scabby by overturning current precedent permitting its use as a non-threatening form of peaceful protest more akin to lawful handbilling than potentially unlawful confrontational picketing.

It may be difficult to convince courts that the use of Scabby the Rat is not shielded by the First Amendment because it is unlawfully coercive and threatening. Scabby's status as a labor icon with his own Twitter and Facebook accounts and the relatively common practice of tourists in New York and Chicago taking photos with the famous inflatable rat add to the difficulty. Scabby and his clones likely will continue to infest worksites in the foreseeable future.

Please contact Jackson Lewis with any questions about this case or the Board.

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