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Venetian Casino Resort, LLC and Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union. Case 28–CA–16000

December 21, 2011

SECOND SUPPLEMENTAL DECISION AND ORDER
BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On September 30, 2005, the National Labor Relations Board issued a decision in this case. The Board held, *inter alia*, that the Respondent violated Section 8(a)(1) of the Act by summoning the police and requesting that they exclude and issue trespass citations to union supporters peacefully demonstrating on the sidewalk in front of the Respondent’s facility. 345 NLRB 1061 (2005). Thereafter, the United States Court of Appeals for the District of Columbia remanded the issue to the Board for further consideration. 484 F.3d 601 (2007), cert. denied 552 U.S. 1257 (2008). The parties have filed supplemental statements of position.

The National Labor Relations Board has reconsidered the remanded issue in light of the briefs on remand and, for the following reasons, has decided to reaffirm its earlier finding that the Respondent violated Section 8(a)(1).

Issue on Remand

The issue on remand, as framed by the court, is whether the Respondent’s summoning the police to remove demonstrators from a sidewalk in front of its premises “was a direct effort to ‘influence . . . law enforcement practices,’ . . . and is therefore protected activity under the First Amendment” pursuant to the *Noerr-Pennington*¹ doctrine.² As the court explained, the *Noerr-Pennington* doctrine

provides that in certain contexts otherwise illegal conduct—such as concerted activity among business competitors—is protected by the First Amendment when it is part of a direct petition to government or “incidental” to a direct petition.

¹ *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

² 484 F.3d at 614.

484 F.3d at 611.³ Having accepted the remand, we find that, given the factual context presented, the Respondent’s conduct did not constitute direct petitioning within the meaning of the *Noerr-Pennington* doctrine.

Facts

The Respondent operates a hotel and casino in Las Vegas, Nevada, built on the site of the former Sands Casino and Hotel. At the time of the events at issue, the hotel and casino were under construction. Pursuant to its development agreement with the local jurisdiction, the Respondent agreed to build a new sidewalk on its property to replace a public sidewalk that had been displaced. The sidewalk would connect the preexisting public sidewalks to the north and south of the property.

In February 1999,⁴ the Respondent learned that the Union was planning a demonstration on March 1 to protest the Respondent’s labor policies and that Clark County had granted the Union a permit to conduct the demonstration on the temporary sidewalk in front of the hotel and casino and on an adjacent lane of Las Vegas Boulevard. Upon inquiry by the Respondent, both the County District Attorney and the Las Vegas Metropolitan Police Department advised that the sidewalk in question constituted a public forum pursuant to the First Amendment of the Constitution and that the demonstration could lawfully occur there.

Notwithstanding that legal interpretation proffered by the responsible public officials, the Respondent decided to initiate a legal challenge to the demonstration. David Friedman, the assistant to the Respondent’s chairman, testified that the Respondent developed a “strategy” “to create an absolutely clear record when we went into Court that we had followed the law and done everything we were supposed to do.” The Respondent surveyed its property lines and had the dividing line between the State property (Las Vegas Boulevard) and its private property marked with orange paint. It also posted signs designating the temporary sidewalk along the front of its facility as private property.

When demonstrators patrolled the sidewalk during the March 1 event, the Respondent’s security guards repeatedly played a recorded message over loudspeakers advising the demonstrators that they were trespassing on private property and were subject to arrest. One of the security guards informed Glen Arnodo, the union’s politi-

³ Although the court described the doctrine as derived from constitutional principles, a difference of opinion exists as to whether the scope of the doctrine is derived from constitutional or statutory principles. See, e.g., Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of Noerr*, 57 Antitrust L.J. 327 (1988). We need not address that issue here.

⁴ All dates hereafter refer to 1999, unless otherwise stated.

cal director, that he was being placed under citizen's arrest. On the day of the demonstration, the Respondent also summoned the police and requested that they remove the demonstrators from its property.

Three days later, on March 4, the Respondent filed an action in Federal district court seeking declaratory relief, a temporary restraining order, and a preliminary injunction against various local government officials, seeking to bar those officials from authorizing demonstrations on its property and from refusing to enforce the Respondent's private property rights. The district court found that the temporary sidewalk in front of the Respondent's facility, while situated on the Respondent's property, was indeed a "public forum," and that the demonstrators, who were engaging in Section 7 activities, had a right to be there. The United States Court of Appeals for the Ninth Circuit affirmed that decision. The Respondent's request for Supreme Court review was denied.⁵

Relying on those court decisions, the administrative law judge in the underlying Board proceeding found that the Respondent violated Section 8(a)(1) by: (1) repeatedly playing the trespass message over a loudspeaker during the demonstration; (2) informing Union Business Agent Glen Arnodo that he was being placed under citizen's arrest, and the following day contacting the police to make a report of the incident; and (3) summoning the police and requesting that the demonstrators be removed from the sidewalk and issued citations. The Board adopted all of these findings. *Venetian Casino Resort*, supra, 345 NLRB 1061. Thereafter, the Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-application for enforcement of its Order.

The D.C. Circuit affirmed the Board's determination that the demonstration was entitled to Section 7 protection and its findings that the Respondent violated Section 8(a)(1) by broadcasting the trespass message over a loudspeaker and by telling Union Official Arnodo that he was under citizen's arrest. *Venetian Casino Resort v. Local Joint Executive Board*, supra, 484 F.3d 601. The court explicitly rejected the Respondent's argument that its broadcast of the trespass message and its attempt to make a citizen's arrest constituted indirect petitioning entitled to immunity under the *Noerr-Pennington* doctrine.⁶ Observing that "[t]he Supreme Court ha[d] extended *Noerr-Pennington* immunity into labor law only to protect direct petitioning, i.e., *employer lawsuits*," and that "it ha[d] yet to do so in labor law for 'incidental' conduct,"

⁵ *Venetian Casino Resort v. Local Joint Executive Board*, 45 F.Supp.2d 1027 (D. Nev. 1999), aff'd, 257 F.3d 937 (9th Cir. 2001), cert. denied 535 U.S. 905 (2002).

⁶ Id. at 612-614.

the court found it unnecessary to decide whether it should extend *Noerr-Pennington* immunity to indirect petitioning "because of the Venetian's inability to show that its conduct was in fact 'incidental' to its lawsuit[.]" Id. at 612 (emphasis added). The court declined, however, to decide whether the Respondent's summoning the police also was unlawful. Observing that the Respondent had argued that summoning the police was entitled to immunity under *Noerr-Pennington* as *direct* petitioning of Government and that the Board had failed to address this argument, the court remanded that issue to the Board. Id. at 614.

On August 27, 2010, the Board issued a Supplemental Decision and Order in which it reaffirmed the enforced portions of its Order but severed for further consideration the issue remanded by the court.⁷

Introduction

In remanding this case to the Board, the D.C. Circuit did not question well-established Board precedent holding that an employer unlawfully interferes with Section 7 rights when it summons police to evict peaceful union demonstrators from areas in which it lacks a requisite property interest.⁸ Rather, the only issue the court directed the Board to consider was whether the Respondent's conduct constituted direct petitioning of the government within the meaning of *Noerr-Pennington*, and, as such was shielded from NLRA liability. For the reasons set forth below, we find that the Respondent's summoning of the police was not direct petitioning and therefore violated Section 8(a)(1).⁹

⁷ 355 NLRB No. 165. In an earlier decision, reported at 354 NLRB 120 (2009), the then two-sitting members of the Board decided not to pass on the remanded issue and withdrew the 8(a)(1) finding. The Respondent petitioned the court for review, and, after the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010) (holding that under Sec. 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegate group of at least three members must be maintained), the Board issued an order setting aside the decision and "retain[ing] this case on its docket for further action." In light of the Board's withdrawal of its Order, the court granted the Board's motion to dismiss the Respondent's petition for review.

⁸ See, e.g., *Schlegel Oklahoma, Inc.*, 250 NLRB 20, 23-24 (1980), enf'd, 644 F.2d 842 (10th Cir. 1981) (respondent violated Sec. 8(a)(1) by threatening to call the police and have handbillers standing on public property "taken away"); *Barkus Bakery*, 282 NLRB 351, 353-354 (1986), enf'd, 833 F.2d 306 (3d Cir. 1987) mem. (respondent had no legal authority to eject union agents from property over which it had no control and therefore violated Sec. 8(a)(1) by attempting to eject them and by calling the police to assist in their removal).

⁹ Because the Respondent did not argue that its summoning of the police constituted *indirect* petitioning within the meaning of the *Noerr-Pennington* doctrine or that such indirect petitioning should be insulated in this context, it is unnecessary for us to consider those issues. The issue remanded by the court was limited to whether, as argued by the Respondent, the Respondent's summoning of the police constituted

Discussion

The *Noerr-Pennington* doctrine protects a private party's petitioning of Federal, State, or local Government for the purpose of influencing the passage or enforcement of laws or regulations. In *Noerr* itself, the conduct challenged as an unlawful restraint of trade was efforts by railroad companies to secure passage and enforcement of laws that had an adverse impact on their competitors in the trucking industry.¹⁰ The Supreme Court noted the significant "difficulties that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws," i.e., that the Sherman Act imposed a limitation on the right of the people in a democratic society to make their wishes known to their representatives. *Noerr*, supra, 365 U.S. at 137–138. The Court found that the Sherman Act did not apply "to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." Id. at 138. Similarly, in *Mineworkers v. Pennington*, supra, the Court found that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials"—in that case efforts by a union and coal operators to persuade the Secretary of Labor to establish a high minimum wage under government contracts for the purchase of coal and to urge the TVA to curtail spot market purchases—"regardless of [the existence of an anticompetitive] intent or purpose." Id. at 670.¹¹

By contrast, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), the Court refused to extend *Noerr-Pennington* immunity to efforts by steel conduit manufacturers to eliminate competition from PVC conduit producers by concertedly modifying a pri-

direct petitioning of the Government under *Noerr-Pennington*. 484 F.3d at 612 fn. 8, 614.

We also observe that this case does not call on us to consider the appropriate standard to apply in other contexts in which an employer may summon the police, for example, when the employer has a reasonable belief that there is a danger to public safety. See, e.g., *Sprain Brook Manor Nursing Home*, 351 NLRB 1190 (2007), and *Nation's Rent, Inc.*, 342 NLRB 179 (2004).

¹⁰ See 155 F.Supp. 768 (E. D. Pa. 1957), affd. 273 F.2d 218 (3d Cir. 1959), revd. 365 U.S. 127, supra.

¹¹ The Court extended *Noerr-Pennington* to lawsuits alleged to violate the NLRA in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), and *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). These cases dealt primarily with the question of whether certain lawsuits initiated by employers were protected by the right to petition, and hence immunized from liability under the NLRA, or whether the lawsuits constituted "sham" petitioning that did not implicate the First Amendment and were not shielded from liability under *Noerr-Pennington*. Because the Respondent's litigation has not been alleged as an unfair labor practice, we need not address the question of "sham" petitioning here.

vate association's Electrical Code to favor steel conduit products. The Court explained that the challenged actions "did not take place in the open political arena" and were not confined "to efforts to persuade an independent decisionmaker. . . ." Id. at 506–507. The Court stated that direct efforts to persuade State and local Governments to ban PVC conduit would have been protected, but that the steel conduit manufacturers' use of their decisionmaking authority within the trade association to exclude PVC conduit via its Electrical Code did not constitute direct petitioning activity.

Consistent with these principles, Federal courts generally have limited *Noerr-Pennington* immunity to petitions that seek the passage of a law or rule, or a significant policy decision regarding enforcement. In *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1298 (5th Cir. 1971), cert. denied 404 U.S. 1047 (1972), for example, the court denied *Noerr-Pennington* immunity to efforts by natural gas producers to cause a State agency to artificially limit production quotas. The court explained that *Noerr-Pennington* protects access to the political process so that persons may inform governmental bodies of their desires with respect to the passage or enforcement of laws, and is inapplicable "[w]here these political considerations are absent." Id. at 1296–1297. Indeed, once a rule is promulgated, there is no immunity for an "attempt to undermine its efficacy. . . ." Id. at 1297.

Likewise, in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), cert. denied 400 U.S. 850 (1970), the court denied *Noerr-Pennington* immunity to efforts by a swimming pool builder to influence a local Government's bid specifications in a manner that favored the builder's products. The court reasoned that no effort to influence the passage of any law was involved. Nor did the disputed activity seek the type of "significant policy determination in the application of a statute" that the *Noerr-Pennington* doctrine protects. Id. at 32. As the court stressed, "*Noerr* is aimed at insuring uninhibited access to government policy makers," not at "dealings with officials who administer" existing laws and policy determinations. Id. at 32–33.

Applying these principles, we reject the Respondent's contention that its summoning of the police constituted a direct petition of Government shielded from liability under *Noerr-Pennington*. No effort to influence the passage of any law was involved; indeed, there is no indication that the Respondent's communication with the police involved any interaction with any official with poli-

cymaking authority.¹² Nor did summoning the police involve a “significant policy determination in the application of a statute. . . .” *Whitten*, supra. Moreover, there is no evidence that the Respondent communicated any information to the police when it summoned them on the day of the demonstration.¹³ To the contrary, it appears that the Respondent simply sought the ejection of the protestors.

In short, the Respondent was not engaged in petitioning within the meaning of *Noerr-Pennington* when it summoned the police to eject the demonstrators. Instead, by seeking action from the responding police officers, the Respondent was effectively attempting to undermine the prior rulings of the district attorney and the police department that it had no legal right to exclude the demonstrators from the temporary sidewalk where the protest occurred. See *Woods*, supra, 438 F.2d at 1297 (“Once the rule is promulgated, defendants may not plead [*Noerr-Pennington*] immunity in their attempt to undermine its efficacy. . . .”). As noted above, the Respondent knew prior to the demonstration that the responsible policy-making authorities had advised that the union supporters coming onto the sidewalk to engage in protected activity would not be trespassing. Under these circumstances, we conclude that the *Noerr-Pennington* doctrine does not preclude a finding that the Respondent’s summoning of the police violated the NLRA. Accordingly, we reaffirm

¹² As to the Government official to whom protected petitions may be directed, Judge Posner’s observation in *Hilton v. City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000), cert. denied 531 U.S. 1080 (2001), is directly on point: “Nor, by the way, does the right to petition for redress of grievances imply a duty of the government to make every government employee a petition receiver. Although we cannot find a case on the point (there are few cases construing the right-to-petition clause), we think it plain that the right is merely a right to petition the appropriate government entity, in this case the local prosecutor rather than the police on the beat.”

¹³ Cf. *Forro Precision, Inc. v. IBM*, 673 F.2d 1045, 1051, 1059–1060 (9th Cir. 1982), appeal after remand 745 F.2d 1283 (9th Cir. 1984), cert. denied 471 U.S. 1130 (1985). In *Forro*, IBM sought the aid of local law enforcement officials regarding the suspected theft of trade secrets. IBM met with officials “to discuss what actions to take to discourage trade secret thievery.” Thereafter, those officials agreed to “take over the investigation” which then became a “cooperative effort between the police and IBM.” In analyzing whether IBM’s activities were shielded by *Noerr-Pennington* immunity, the Court observed that the doctrine “promotes two policies: (1) protection of the political process, because decision-making bodies rely on private parties to come forth with information; and (2) protection of the individual’s right to petition government.” Acknowledging that “citizen communication with police does not generally promote the free exchange of ideas, nor does it provide citizens with the opportunity to influence policy decisions,” the *Forro* court concluded nevertheless that *Noerr-Pennington* immunity applies to “citizen communications with police,” in keeping with the different but “equally strong” public policy of ensuring the free flow of information to the police. No such “flow of information” policy considerations are implicated here.

our prior finding that this conduct violated Section 8(a)(1).

Our holding is consistent with the values embodied in the *Noerr-Pennington* doctrine. We emphasize that the question of whether the Respondent’s prior communications with the county district attorney and the police seeking a ruling in its favor were petitioning protected by *Noerr-Pennington* is not before us, inasmuch as there is no allegation that those communications violated the Act. Nor is there any contention that the Respondent’s efforts to press its property claims in the Federal courts violated the Act. The Respondent’s ability to present its position to local and Federal authorities through those means demonstrates, in our view, that application of the Act’s protection of employee Section 7 rights can be achieved—and was achieved here—without any infringement of the First Amendment right to petition.

ORDER

The National Labor Relations Board reaffirms its finding of the violation at issue reported at 345 NLRB 1061 (2005), and orders that the Respondent, Venetian Casino Resort, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Summoning the Las Vegas Metropolitan Police and requesting that demonstrators on behalf of the Union, who are engaged in a peaceful demonstration, be issued trespass citations and excluded from the sidewalk in front of the Respondent’s facility.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its casino-hotel in Las Vegas, Nevada, copies of the attached notice marked “Appendix.”¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

customarily communicates with its employees by such means.¹⁵ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 1999.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 21, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹⁵ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights.

Specifically:

WE WILL NOT summon the Las Vegas Metropolitan Police and request that demonstrators on behalf of the Union, who are engaged in a peaceful demonstration, be issued trespass citations and excluded from the sidewalk in front of our facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce individuals in the exercise of the rights guaranteed to them by Section 7 of the Act.

VENETIAN CASINO RESORT, LLC