

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VENETIAN CASINO RESORT, LLC,

Respondent

and

LOCAL JOINT EXECUTIVE BOARD OF
LAS VEGAS, CULINARY WORKERS
UNION, LOCAL 226 and BARTENDERS
UNION, LOCAL 165 affiliated with UNITE
HERE, AFL-CIO,

Charging Party

CASE 28-CA-016000

RESPONDENT'S STATEMENT OF POSITION

ATTORNEYS FOR RESPONDENT

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I. *Introduction*

In *Venetian Casino Resort, LLC v. NLRB*, 793 F.3d 85, 90 (D.C. Cir. 2015), the court held “that the act of summoning the police to enforce state trespass law is a direct petition to government subject to protection under the *Noerr-Pennington* doctrine.” The court remanded to the Board the question of whether the Venetian’s “request for assistance from the police officers at the scene” was “sham petitioning” or “a valid attempt to secure its private property rights”? *Id.* at 92. A petition is a sham only if it can be shown that it was both (1) “objectively baseless” and (2) “brought with the specific intent to further wrongful conduct through the use of governmental process.” *Id.* (quoting *Nader v. Democratic National Committee*, 567 F.3d 692, 696 (D.C. Cir. 2009) (internal quotations omitted)). Stated differently, “the *First Amendment* prohibits any sanction” here so long as the Venetian’s “petition was in good faith.” *Nader*, 567 F.3d at 696.

The record supports only the conclusion that the Venetian was making a valid attempt to secure its private property rights. Following the advice of counsel, and acting consistent with the terms of a federal court judgment in favor of another Las Vegas casino resort, the Venetian summoned the police to enforce: (1) Nevada law that generally proscribes picketing on private property and limits the placement of pickets; and (2) the Venetian’s right to control conduct on its private property, pursuant to a written agreement with the Nevada Department of Transportation (NDOT). Administrative Law Judge Gregory Z. Meyerson, as affirmed by the Board, explicitly observed in his decision that the Venetian “may well have acted in ‘good faith’ in this matter,” and “may very well have had a genuine good-faith belief in the legal correctness of its position.” *Venetian Casino Resort, LLC*, 345 NLRB 1061, 1069 (2005). Accordingly, the Board should find that the Venetian did not engage in sham petitioning.

II. *Facts and Procedural History*

In January 1999, four months before the luxury casino resort began operating, the Venetian and NDOT entered into an agreement requiring the Venetian to build and maintain a private sidewalk on its property, running parallel to Las Vegas Boulevard. *Id.* at 1063. The agreement allowed NDOT to add another traffic lane to Las Vegas Boulevard where a public sidewalk had once existed. *Id.* Within a month of entering into the agreement with NDOT the Venetian constructed a temporary walkway on its property in the location of the future private sidewalk. *Id.*

This case arose on March 1, 1999, when the Charging Party sought to test the Venetian's property rights concerning the private sidewalk, by holding a large demonstration to "take back the sidewalk at the Venetian." RX6; T132.¹ The Venetian strenuously objected to the demonstration being on its private property, as discussed at length in multiple Board and court decisions. The Venetian asked police officers at the demonstration to cite the trespassing demonstrators and to remove them from the Venetian's private property. The events leading to the Venetian's summoning of the police are discussed in part III.A *infra*. The police declined the Venetian's request.

Shortly thereafter, the Venetian filed suit in federal court for injunctive and declaratory relief against the unions and various government entities. *Venetian Casino Resort, LLC v. Local Joint Executive Board of Las Vegas*, 45 F. Supp. 2d 1027 (D. Nev. 1999). Ultimately, a Ninth Circuit panel (2-1) held that the Venetian's private sidewalk had become a public forum. *Venetian Casino Resort, LLC v. Local Joint Executive Board of Las Vegas*, 257 F.3d 937 (9th

¹ References to the transcript of the hearing before the ALJ are referred to as "T" followed by the specific page number(s). References to joint exhibits introduced at the hearing are referred to as "JX," and Respondent's exhibits as "RX," followed by the specific exhibit number(s).

Cir. 2001), *cert. denied*, 535 U.S. 905 (2002). Thus, the Venetian lost the right to control the use of this area of its private property. *See id.* at 946, 948.

In the meantime, Charging Party filed the underlying unfair labor practice charge and the Regional Director issued a complaint. *See Venetian*, 345 NLRB at 1062. A hearing was delayed until after the federal court litigation concluded. *See id.* Based on the Ninth Circuit's determination of the Venetian's property rights, *id.* at 1066, Judge Meyerson found that the Venetian had violated Section 8(a)(1) of the Act by interfering with the demonstration. *Id.* at 1069. The Board, in its 2005 Decision and Order, affirmed. *Id.* at 1061-62.

The D.C. Circuit affirmed the Board's 2005 Decision and Order on all but one issue. *Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601, 603 (D.C. Cir. 2007). The court agreed with the Board that the Venetian's broadcast of an anti-trespass message and its attempted citizen's arrest violated Section 8(a)(1). *Id.* However, the court remanded to the Board to decide whether the Venetian's request that the police officers at the demonstration issue criminal citations to the demonstrators and block them from the walkway was protected *First Amendment* petitioning. *Id.* at 610, 614.

On remand, the Board first severed the remanded issue from that portion of the 2005 Decision and Order that was enforced by the D.C. Circuit. *Venetian Casino Resort, LLC*, 355 NLRB No. 165 (Aug. 27, 2010).² Subsequently the Board issued its 2011 Decision and Order,

² The Venetian has fully complied with the requirement to post a notice to employees, which included the following:

WE WILL NOT read or play a recording of a trespass message over a loudspeaker directed to individuals who are peacefully demonstrating and engaging in lawful conduct on behalf of the Union, or any other labor organization, on the sidewalk in front of our property adjoining Las Vegas Boulevard South, Las Vegas, Nevada.

WE WILL NOT place agents of the Union, or any other individuals, who are engaged in a peaceful demonstration and lawful conduct on behalf of the Union,

finding that the Venetian’s conduct was not a direct petition to government protected by the *Noerr-Pennington* doctrine. *Venetian Casino Resort, LLC*, 357 NLRB No. 147 (Dec. 21, 2011). Thus the Board concluded that the Venetian had violated Section 8(a)(1) by summoning the police. *Id.*

The Venetian petitioned the D.C. Circuit for review and the Board cross-applied for enforcement of the 2011 Decision and Order. *Venetian Casino Resort, LLC v. NLRB*, 793 F.3d 85 (D.C. Cir. 2015). The court granted the Venetian’s petition, denied the Board’s cross-application, and remanded to the Board the question of whether the Venetian’s petitioning of the police was a sham. *Id.* at 92.

III. Argument

The Venetian’s summoning of the police was a good-faith attempt to “influence . . . law enforcement practices.” *Eastern R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127, 144 (1961). The right to petition is “one of ‘the most precious of liberties safeguarded by the *Bill of Rights*.’” *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 524 (2002) (quoting *United Mine Workers v. Illinois Bar Ass’n*, 389 U.S. 217, 222 (1967)). To conclude that the Venetian somehow lost *Noerr-Pennington* protection, the Board would have to find that the Venetian’s petition was both (1) “objectively baseless” and (2) “brought with the specific intent to further wrongful conduct through the use of governmental process.” *Id.* at 92 (quoting *Nader v. Democratic National Committee*, 567 F.3d 692, 696, (D.C. Cir. 2009) (internal quotations omitted)). The General Counsel has not and cannot prove either element.

or any other labor organization, on the sidewalk in front of our property adjoining Las Vegas Boulevard South, Las Vegas, Nevada, under citizen’s arrest, or contact the Las Vegas Metropolitan Police Department to report the citizen’s arrest.

Id., slip op. at 2.

In *BE&K*, the Court explained this two-part test:

For example, an employer may file suit to stop conduct by a union that he reasonably believes is illegal under federal law, even though the conduct would otherwise be protected under the NLRA. As a practical matter, the filing of the suit may interfere with or deter some employees' exercise of NLRA rights. ***Yet the employer's motive may still reflect only a subjectively genuine desire to test the legality of the conduct.*** Indeed, in this very case, the Board's first basis for finding retaliatory motive was the fact that petitioner's suit related to protected conduct that petitioner believed was unprotected. ***If such a belief is both subjectively genuine and objectively reasonable, then declaring the resulting suit illegal affects genuine petitioning.***

The Board also claims to rely on evidence of antiunion animus to infer retaliatory motive. Yet ill will is not uncommon in litigation. Disputes between adverse parties may generate such ill will that recourse to the courts becomes the only legal and practical means to resolve the situation. But that does not mean such disputes are not genuine. As long as a plaintiff's ***purpose*** is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively.

Id. at 533-34 (emphasis added to first paragraph; citations omitted); *see also Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 58 (1993) ("We regard as sham 'private action that is not genuinely aimed at procuring favorable government action,' as opposed to 'a valid effort to influence government action'") (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988)).

At no time in the sixteen-year period since this litigation commenced has the General Counsel alleged or argued, let alone introduced any evidence to support a finding, that the Venetian was engaged in sham petitioning. Rather, as discussed herein, the evidence reveals just the opposite. The Venetian's summoning of the police was a genuine attempt to secure its private property rights.

A. *The General Counsel Has Not and Cannot Show that the Venetian's Summoning of the Police was Objectively Baseless*

The Venetian's summoning of the police was anything but "objectively baseless." In the context of litigation, the Supreme Court has explained that "[i]f an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized." *PRE*, 508 U.S. at 60. An action to petition the government is not objectively baseless simply because it was unsuccessful. *See Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 399 (4th Cir. 2001) (competitor's "'deceitful, 'underhanded,' and 'morally wrong'" tactics to challenge zoning permit, even though unsuccessful, were not objectively baseless). Thus, the Board "must 'resist the understandable temptation to engage in *post hoc* reasoning by concluding' that an ultimately unsuccessful 'action must have been unreasonable or without foundation.'" *PRE*, 508 U.S. at 61 n.5 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978)).

The Venetian's unsuccessful federal court lawsuit is an example of an action that was not objectively baseless. The Board previously acknowledged that the lawsuit "has not been alleged as an unfair labor practice."³ *Venetian*, 357 NLRB No. 147, slip op. at 3 n.11. The determination

³ In the original complaint issued on November 30, 1999, the General Counsel alleged in paragraph 5(c):

On or about March 4, 1999, the Respondent caused to be filed a lawsuit styled *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas et al.*, Case CV -S-99-00276-PMP in the United States District Court for the District of Nevada against the Union, the District Attorney of Clark County, Nevada, Stewart L. Bell (herein called Bell), and the Las Vegas Metropolitan Police Department (herein called Metro Police), seeking, inter alia, to have the Arnado complaint prosecuted, to mandate that Bell and the Metro Police arrest future demonstrators at the Respondent's facility, and to force Bell and the Metro Police to deny future parade permits to demonstrators at the Respondent's facility.

Following issuance of the Court's decision in *BE&K*, Acting Regional Director Michael J. Karlson advised the parties by letter dated January 7, 2003 that he had approved the withdrawal

that the lawsuit was not objectively baseless applies with equal force to the Venetian's summoning of the police.

Prior to the March 1, 1999 demonstration to test the Venetian's property rights in connection with the sidewalk, the Venetian had every reason to believe from the express terms of its written agreement with NDOT that:

- the sidewalk was the Venetian's "*private property*";
- the Venetian was obligated to keep and maintain the sidewalk in an "*orderly, clean, safe, and sanitary condition*";
- the NDOT was "*not* taking any private property interest" in the sidewalk; and
- the Venetian "*retains full rights inherent to the ownership of private property* to the full extent permitted by the *Fifth and Fourteenth Amendment[s]* to the United States Constitution."

Venetian, 257 F.3d at 949-50 and JX3 at 26-28 (emphasis added); T98-107.

Based on Nevada law and a federal court judgment in favor of the Venetian's nearby competitor, MGM Grand, the Venetian expected that the police would enforce its private property rights. RX2-3; T107-12, 115. Nevada law provides that "it is *unlawful for any person to picket on private property* without the written permission of the owner . . . *even if the private property is open to the public* as invitees for business." RX3 and Nev. Rev. Stat. § 614.160 (emphasis added)). The judgment in the MGM Grand case expressly permits that casino resort "the legal right to restrict the speech, conduct and other activities" on its sidewalks and "to invoke all legal remedies provided by law . . . including, without limitation . . . *requesting that*

of this allegation. Accordingly, it was omitted from the General Counsel's new complaint issued on January 23, 2003.

such persons be issued citations and be taken into custody by police officers.” RX2 (emphasis added).

The Venetian sincerely believed that by virtue of its contract with NDOT it had reserved *all* property rights and thus would be obligated to and able to control conduct on its private sidewalk property “just like any other property owner.” T99. This included the right to exclude smut peddlers, vagrants, loiterers, salespersons, prostitutes, panhandlers, political demonstrators, protestors, etc. T105-06, 110. As of March 1, 1999, the Venetian reasonably and in good faith understood that it had the right to regulate “expressive activity on its private property.” T121. Thus, if it had not taken action to protect its “property rights on this palazzo [and private sidewalk] area,” the Venetian feared “this paved beautiful area,⁴ would be subject to *First Amendment* activities” of “any kind.” T120, 147.

Clark County District Attorney Stewart Bell was not of the same view. Although he did not provide any legal authority for his position when the Venetian requested it, Bell believed the Venetian’s property rights concerning the private sidewalk were not clear. T138-39. He also did not explain why the Venetian should be treated differently than the MGM Grand (RX2). T139-40. Although Bell initially said he would “think about” enforcing the Nevada trespass statute (RX3), he later said it should be left up to the courts to decide.⁵ T140. The police initially advised the Venetian that although they “weren’t going to be arresting anybody,” they had been

⁴ “[T]he sidewalk at issue is markedly different from the public sidewalks to which it connects. It was designed to fit within the design concept of the Venetian, with pavement patterns and light posts matching those of the exterior plaza area of the hotel. The sidewalk seamlessly matches the Venetian and does not match the continuation of the sidewalk on either side.” *Venetian*, 257 F.3d at 954 (Brunetti, J., dissenting).

⁵ In April 1999, counsel for Bell and the police stated that their position had been “misinterpreted”; specifically, their position was that they had “*not rendered an opinion* on the issue” of whether the sidewalks are a public forum for expressive activity. JX3 at 39 (emphasis added).

advised by Bell “to make sure that nobody got hurt.” T141. The police later clarified that, until there was a court ruling on the matter, they would “neither arrest nor cite demonstrators so long as they are peaceably proceeding along the sidewalk *without blocking other pedestrians* or vehicles and do not proceed onto portions of the Venetian’s property where the general public does not have access.” JX3 at 39 (emphasis added).

The police further confounded the matter when they issued a permit for the March 1 demonstration. *Id.* at 45-46. Instead of limiting the demonstration to just one lane of Las Vegas Boulevard, the police mistakenly included the “sidewalks located on the private property of the Venetian.” *Id.* at 45. At no time was the Venetian “afforded an opportunity to be heard on the issuance or scope of the permit.” *Id.* at 34.

More than 1,300 people joined the March 1 demonstration. From approximately 4:30 p.m. until 6:30 pm., the group covered the temporary walkway and one lane of Las Vegas Boulevard, thereby *impeding pedestrian traffic and resulting in several complaints*. *Id.* at 34; T130. Union official Glen Arnodo effectively conceded that the demonstrators did not comply with Nevada law that limits the number of pickets at sidewalk and driveway entrances and exits. T59-60; RX3 and Nev. Rev. Stat. § 614.160.

Given these circumstances, and following the advice of both in-house and outside legal counsel, the Venetian believed it was necessary to involve the police.⁶ The Venetian had a genuine basis for exercising its *First Amendment* right to petition the police to enforce both Nevada law (RX3) and the Venetian’s agreement with NDOT (JX3 at 26-28), just as the police are required to do for the Venetian’s competitor, MGM Grand (RX2). The Venetian could not

⁶ If the demonstration was deemed to be part of a “labor dispute,” the Venetian would have been required under the Norris-LaGuardia Act to show “[t]hat the public officers charged with the duty to protect [its] property [were] unable or unwilling to furnish adequate protection” in order to obtain injunctive relief in federal court. 29 U.S.C. § 107(e).

risk having potential future demonstrators assert that the Venetian had waived its right to control the use of its private sidewalk. T110-12, 120.

There was an upshot to the Venetian's *First Amendment* petitioning. Shortly after the March 1 demonstration, the police conceded that the "Special Events Section does not intend in the future to issue special events permits which include sidewalks on the private property of the Venetian." JX3 at 45.

For all these reasons, the Venetian's summoning of the police cannot be deemed to have been "objectively baseless." Indeed, any contrary finding would be precluded by Judge Meyerson's explicit observation that the Venetian "may very well have had *a genuine good-faith belief in the legal correctness of its position.*" *Venetian*, 345 NLRB at 1069 (emphasis added).

B. *The General Counsel Has Not and Cannot Show that the Venetian's Summoning of the Police was Specifically Intended to Further Wrongful Conduct*

Assuming *arguendo* that the Venetian's summoning of the police could somehow meet the "objectively baseless" standard, the Board would also have to find that the Venetian acted "with the specific intent to further wrongful conduct through the use of governmental process." *Venetian*, 793 F.3d at 92 (quoting *Nader*, 567 F.3d at 696). Such a finding could not be based on the mere fact that the conduct "would otherwise be protected" under the Act. *BE&K*, 536 U.S. at 533. Nor could such a finding be based on "evidence of antiunion animus to infer retaliatory motive."⁷ *Id.* at 534; see *PRE*, 508 U.S. at 63 ("a showing of malice" is insufficient). In short,

⁷ The Venetian was constructed entirely by union-represented building tradespersons. T95. Thus, other than approximately 10 security guards and some managers and clerical personnel, the construction site was occupied entirely by union-represented employees. T94-95.

“the *First Amendment* prohibits any sanction” by the NLRB so long as the Venetian’s “petition was in good faith.” *Nader*. 567 F.3d at 696.

Once again, Judge Meyerson explicitly assumed that the Venetian “may well have *acted in ‘good faith’* in this matter,” and “may very well have had *a genuine good-faith belief* in the legal correctness of its position.” *Venetian*, 345 NLRB at 1069 (emphasis added). Chairman Battista and Members Liebman and Schaumber adopted these findings without any limitation, *id.* 1061-62, thereby precluding a determination that the Venetian had the “specific intent to further wrongful conduct through the use of governmental process.”

It has never been disputed that the Venetian had a reasonable, good-faith basis for claiming that it had a legal right to exclude third party demonstrators from using its private property. A Ninth Circuit panel split 2-1 on the issue, with one judge agreeing entirely with the Venetian’s position. *Venetian*, 257 F.3d at 956 (Brunetti, J., dissenting). Even the Ninth Circuit and District Court judges who found against the Venetian agreed the sidewalk constituted Venetian’s private property. *Id.* at 939; *Venetian*, 45 F. Supp. 2d at 1034 (Venetian had not “waived its right to exclude” from sidewalk on its private property). There is no evidence that the Venetian summoned the police for the specific intent to further wrongful conduct.

In contrast to the Venetian’s actions, the court in *Forro Precision, Inv. v. International Business Machines Corp.*, 673 F.2d 1045 (9th Cir. 1982), hypothesized that the sham exception could be met if a party “provided the police with deliberately false information, *solely* for the purpose of harassing [another] or of achieving ends unrelated to law enforcement.” *Id.* at 1060 (emphasis added); see *Ottensmeyer v. Chesapeake & Potomac Telephone Co. of Maryland*, 756 F.2d 986, 994 (4th Cir. 1985) (agreeing with *Forro*). Where, however, a party “in good faith asked the police to perform a valid police function,” it is protected by the *Noerr-Pennington*

doctrine. *Forro*, 673 F.2d at 1061. Here as the record reflects, the Venetian acted in good faith when it petitioned the police to secure its property rights.

The Venetian's sole purpose in contacting the police was to protect its property rights. There is utterly no evidence that the Venetian's actions were a mere "sham" to mask an unlawful motive. T147. There also is no evidence of "ill will" on the part of the Venetian above and beyond that which is "[c]ommon in litigation" and other adversarial contexts. *BE&K*, 536 U.S. at 534. In short, there simply is no evidence in the record to contravene the conclusion that the Venetian's summoning of the police was a reasonable and genuine attempt to protect its property rights. T150.

IV. Conclusion

The Venetian respectfully submits that its request for assistance from the police was a valid attempt to secure its private property rights. Accordingly, the Board should dismiss this final remaining allegation.

Dated: October 16, 2015

Respectfully submitted,

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By _____
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CERTIFICATE OF SERVICE

On October 16, 2015, I served Respondent's Statement of Position via e-mail to:

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I declare under penalty of perjury that the foregoing is true and correct under the laws of the United States of America.

By: _____
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