

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 7, 2015

TO: Nancy Wilson, Regional Director
Region 6

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Holdings Acquisition Co., L.P., 512-0125
d/b/a Rivers Casino 512-5033
Case 06-CA-146727 512-5072-3900

The Region submitted this case for advice regarding whether Holdings Acquisition Co., L.P. d/b/a Rivers Casino (“the Employer”) violated Section 8(a)(1) when it summoned the police in response to UNITE HERE Local 57’s (“the Union”) conduct of projecting the message “SHAME ON RIVERS” on the wall of the Employer’s facility using a spotlight. We conclude that the Employer has established that it was motivated to call the police by a reasonable concern with its property rights. Thus, the Employer did not violate Section 8(a)(1), and the Region should dismiss the charge, absent withdrawal.

FACTS

The Employer operates a casino in Pittsburgh, Pennsylvania. Since 2013, the Union has sought to organize certain of the Employer’s employees, and, as part of that campaign, it holds “actions” designed to promote discussions about organizing among employees and the public.

On February 13, 2015,¹ members of the Union’s employee organizing committee handed out red buttons with the word “Fairness” to their coworkers. That evening, around 7:00 p.m., a casino employee, along with Union representatives and community activists, handed out “Fairness” stickers and flyers to patrons of the casino on the public sidewalk in front of the casino and at the front entrance.²

¹ All events occurred on this day.

² The Employer did not attempt to prevent the Union from engaging in this handbilling.

That same evening, the Union also placed a spotlight on the public sidewalk and projected the message “SHAME ON RIVERS” on the wall of the Employer’s facility near the front entrance. The words covered a three-story high area of the building. The Employer became aware of the message around 7:30 p.m. A security supervisor for the Employer approached a group of about five individuals standing near the spotlight to ask who they were. They identified themselves as the Union and stated that they were engaged in a peaceful protest. A Union representative asked if they were standing on public property, and the supervisor confirmed that they were.

The security supervisor returned to the casino to report what he had observed, and, upon seeing images of the Union’s projection, the Employer’s security director called 911 contending that the Union’s conduct created a safety hazard because drivers could be blinded by the spotlight, and that it also constituted defacement of casino property. The Pittsburgh police arrived around 8:00 p.m., and an officer approached the group standing near the spotlight to ask what they were doing. They identified themselves as the Union. When the officer went to speak to the Employer’s security director, he reiterated the concerns expressed in his 911 call. The officer replied that the Union’s conduct was not defacement because the Union supporters were not touching the building. He also stated that the Union supporters were peaceful and that the police would not do anything about their conduct. After speaking with the Employer’s security director, the police advised the Union that they could continue their protest as long as they did not block customers from entering or exiting the casino.³

About twenty minutes later, the police returned and told the Union that the Employer had called above the officers’ heads.⁴ One police officer advised the Union that they could keep the light running while she awaited instructions from her lieutenant. Two more officers arrived and informed the Union that the Employer was claiming that, although they were standing on public property, the image they were projecting was a trespass. Ten minutes later, the police directed the Union to shut off the light, which they did. The lieutenant arrived and informed the Union that the

³ The Union subsequently moved down the sidewalk about 200 feet to prevent their spotlight from shining into the eyes of motorists or bus drivers exiting the casino garage. There is no evidence that anyone made a safety-related complaint about the Union’s spotlight.

⁴ The Employer’s security director stated that after the police officers who first responded did not require the Union to shut off its spotlight, he contacted a high-ranking Pittsburgh police official with whom he has some personal relationship. The security director requested that this high-ranking official send a supervisory officer to the casino to reassess the situation.

Employer had called the District Attorney and that they needed to keep the light off or they would be given a citation and possibly fined.⁵ The Union loaded the spotlight into a car and drove away. It was slightly after 9:00 p.m. when they left.

The Union contends that the Employer violated Section 8(a)(1) by summoning the police and requesting that they direct the Union to turn off the spotlight or be cited for trespass. The Union asserts that it was engaged in protected Section 7 activity when it projected “SHAME ON RIVERS” on the Employer’s building, which was intended to—and, in fact, did—promote discussion of self-organization among employees and encourage casino patrons to support the organizing efforts.⁶ The Union further asserts that the Employer did not carry its burden to show that the Union infringed on its property rights under Pennsylvania law.⁷ It also contends that even assuming that it had infringed on those rights, Pennsylvania law protects the Union’s free speech rights over the Employer’s property rights to the extent that there is a conflict.

The Employer asserts that it did not violate the Act when it summoned the police because it had a “reasonable concern” that the Union was interfering with its legally protected property interests.⁸ It maintains that it did not call the police to have the Union evicted from a public sidewalk, but, rather, its concern was solely to have the spotlight shining the Union’s message onto its building turned off. The Employer does not dispute that the Union’s message would be otherwise protected, but argues that, by projecting the message onto its property, the Union committed a trespass and

⁵ The Employer has stated that it told the lieutenant that it specifically wanted the light turned off but did not object to the Union’s handbilling activities.

⁶ See *Bristol Farms*, 311 NLRB 437, 438 fn. 8 (1993) (finding picketing and handbilling to advertise to the public a labor dispute with the employer was “clearly protected”).

⁷ See *Commonwealth v. Tate*, 432 A.2d 1382, 1390-91 (Pa. 1981) (reversing criminal trespass convictions of five defendants for peacefully distributing leaflets without a permit in area of private college campus that was normally open to the public where college had assembled public audience for speech by FBI director).

⁸ See *Nations Rent*, 342 NLRB 179, 181 (2004) (no violation where employer summoned police based on safety and trespass concerns) (citing *Great American*, 322 NLRB 17, 21 (1996)).

thereby improperly infringed on the Employer's property rights.⁹ Alternatively, the Employer argues that the Union's conduct constituted a private nuisance.

ACTION

We conclude that the Employer has established that it was motivated to call the police by a reasonable concern with its property rights. Thus, the Employer did not violate Section 8(a)(1), and the Region should dismiss the charge, absent withdrawal.

An employer may seek to have the police take action against labor protestors without violating Section 8(a)(1) where it is motivated by a reasonable concern regarding public safety or interference with its legally protected interests.¹⁰ Regarding the latter concern, "an employer can take reasonable steps to prevent nonemployees from trespassing onto private property."¹¹ It is the employer's burden to show that it had a reasonable concern about safety or a legally protected interest.¹² However, the employer need not be substantively correct that a safety concern is present or that its property rights have been infringed, as long as its concerns are reasonable.¹³

Although the Employer here asserts two reasons for calling the police in response to the Union's conduct, it is clear that it did not have a reasonable concern regarding the first of those reasons – that the Union's conduct was creating a safety hazard. The police did not indicate that the spotlight should be turned off for safety reasons. And the record contains no complaints from employees, customers, or members of the

⁹ See *Liberty Place Retail Associates v. Israelite School of Universal Practical Knowledge*, 102 A.3d 501, 506 (Pa. Super. Ct. 2014) (citing Restatements (Second) of Torts § 158 to define civil trespass under Pennsylvania law).

¹⁰ See *Nations Rent*, 342 NLRB at 181.

¹¹ *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2007) (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992)).

¹² See *Sprain Brook Manor Nursing Home*, 351 NLRB at 1191 (noting that "Respondent failed to establish it was motivated by reasonable concerns when it called the police" in response to picketing activity).

¹³ See *Nations Rent*, 342 NLRB at 181 ("So long as the employer is acting on the basis of a reasonable concern, Section 8(a)(1) is not violated merely because the police decide that, under all the circumstances, taking action against the pickets is unwarranted.").

general public about glare or other safety-related issues regarding the Union's conduct. Indeed, after the police made their initial visit, the Union of its own accord relocated the spotlight 200 feet away from the casino's garage to further ensure that no light was shining into drivers' eyes.¹⁴

The Employer's second asserted reason for calling the police was that it was concerned that the Union's projection of the "shame on" message onto its building interfered with various protected property interests. When the Employer's security director first called 911, he claimed that the Union was defacing the Employer's property. He reiterated that claim when the police arrived. Then, when the police returned to the casino for the second time, they informed the Union supporters that the Employer was claiming that their conduct was a trespass. Finally, in its position statement, the Employer added that the Union's conduct constituted a private nuisance. As set forth below, it is not clear that the Employer's claims in this regard have merit, but we cannot demonstrate that the Employer's concern about trespass and the creation of a nuisance were unreasonable.¹⁵

Regarding the trespass allegation, although the Employer argues that the Union committed a trespass under Pennsylvania law by projecting its message on its building, there is no Pennsylvania legal authority stating that the projection of light onto the property of another is a trespass.¹⁶ The case cited by the Employer, *Liberty*

¹⁴ *Compare Greenbrier*, 340 NLRB 819, 820 (2003) (employer did not have reasonable concern with public safety when it called police where "there is no evidence of an actual or potential traffic problem as a result of the picketing"), *enf. denied*, 377 F.3d 394 (4th Cir. 2004), *with Great American*, 322 NLRB at 22 (employer had reasonable concern when it called police to report union handbillers because their activity was creating a traffic hazard and inhibiting access to the employer's parking lot).

¹⁵ Regarding the defacement allegation, the first police officer who responded to the call informed the Employer that because the Union supporters were not touching the building, their conduct did not constitute defacement. The Employer has not argued in further support of this claim and apparently has abandoned it.

¹⁶ In a case involving facts similar to this case, a New Jersey trial court recently entered an injunction against one of the Union's sister locals. *See Trump Entertainment Resorts, Inc. v. UNITE HERE Local 54*, Docket No. ATL-C-57-15 (N.J. Super. Ct. Ch. Div. August 28, 2015). The local union there had been using a spotlight to project the words "Boycott Taj" on the façade of the employer's casino-hotel. The New Jersey trial court granted a permanent injunction against the projection of "any images, symbols, text or words upon any property owned by the [employer]." Because that case involved application of New Jersey rather than Pennsylvania law, it does not provide any guidance in the current case. *See, e.g., Bristol Farms*, 311 NLRB at 438

Place Retail, involved a civil claim of third-party trespass where a person or group engages in conduct that causes third parties to trespass on the land of another,¹⁷ and it does not support a trespass finding here. It is undisputed that the Union supporters were on public property, and there is no claim that their conduct caused third persons to enter the Employer's property. Moreover, the Employer's reference to Restatement (Second) of Torts § 158, and comment *i.* to that section, is also misplaced. Comment *i.* clarifies that an actionable civil trespass includes when an actor throws, propels, or places a thing on or beneath another's property, or in the air space above it. Shining a light is not the same as "propelling . . . a thing" onto another's land or flying a "kite or balloon through the air above it."¹⁸ Indeed, what appears to be required in order to make out a trespass claim under Pennsylvania law is a *physical intrusion* onto real property in a tangible way.¹⁹ In short, the Employer's theory of trespass due to light projection does not appear to be a viable theory under Pennsylvania law.

Regarding the private nuisance allegation, it is not clear whether the Employer held this concern at the time of the Union's conduct.²⁰ Moreover, the Employer's claim is of questionable merit. In support of this theory the Employer again cites

(only the law of the relevant state determines whether an employer has a sufficient property interest to exclude nonemployee union organizers).

¹⁷ 102 A.3d 506-08. In *Liberty Place Retail*, a state intermediate appellate court found that members of a religious group did not commit either a trespass or nuisance where they stationed themselves outside of a mall entrance with an amplifier to broadcast their message, which included inflammatory statements aimed at individuals passing by and generalized commentary indicating a willingness to engage in violence against others not subscribed to their position, which caused a large crowd to gather on the mall's property.

¹⁸ Restatement (Second) of Torts § 158 cmt. *i.*

¹⁹ See *Liberty Place Retail Assoc.*, 102 A.3d at 506 ("Under Pennsylvania law, [o]ne is subject to liability to another for trespass . . . if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so. . . ."). Cf. *Commonwealth v. Giddings*, 686 A.2d 6, 12 (Pa. Super. Ct. 1996) (finding criminal trespass where defendant inserted screwdriver into hole in door of home even though he never entered himself because screwdriver was extension of his person).

²⁰ It would be difficult to for the Employer to establish that it was motivated to call the police on February 13 because of a private nuisance claim if it did not raise this rationale until after that date.

Liberty Place Retail,²¹ and *Shiban v. Lightcap*.²² In *Liberty Place Retail*, the state intermediate appellate court upheld the trial court's finding that the defendant-religious group's demonstration on public property did *not* constitute an actionable civil nuisance because the noise level was not sufficiently high and there was a lack of pecuniary harm. The state appellate court further held that the resulting crowd that gathered on the private property of the retail establishment in response to the group's conduct could not on its own constitute a private nuisance.²³ In *Shiban v. Lightcap*, a state trial court found an actionable nuisance where light spillage from a lamppost illuminating the defendant homeowner's driveway was so intense that the plaintiff homeowner was able to read by it, preventing the homeowner from sleeping at night. Neither case supports finding a private nuisance in the circumstances here.²⁴

At the same time, although we question the merits of the Employer's property interest claims, we are mindful that the Employer need not be substantively correct that its rights have been infringed upon to satisfy its burden to show that it had a reasonable concern when it called the police in response to the Union's spotlight. Because Pennsylvania law has not passed on the conduct here at issue, making it unclear whether or not the Union's conduct was, in fact, a trespass or private nuisance, it would be difficult to conclude that the Employer did not have a reasonable concern with protecting those property rights.²⁵ Moreover, the totality of the circumstances do not show that the Employer had no genuine concern about its

²¹ 102 A.3d at 508-10.

²² 2 Pa D. & C. 3d 638, 640 (C.P. Montgomery 1977).

²³ See *Liberty Place Retail Assocs.*, 102 A.3d at 510.

²⁴ See also *Kohr v. Weber*, 166 A.2d 871, 875-76 (Pa. 1960) (illuminated drag racing strip along with noise from drag races was nuisance; plaintiffs-property owners demonstrated harm because of the negative effects on the chinchillas they raised, which caused owners, who raised them for commercial purposes, to have many of the animals put down); *Karpiak v. Russo*, 676 A.2d 270, 274 (Pa. Super. Ct. 1996) (no liability for nuisance without demonstration that dust coming onto residential property from nearby landscaping supply business created "significant" harm); *Fontanella v. Leonetti*, 33 Pa. D. & C. 2d 73, 75 (C.P. Lawrence 1963) (" . . . nowhere do we find a Pennsylvania case saying that invasion by light alone is actionable [nuisance]").

²⁵ In fact, based on the police lieutenant's representation to the Union supporters, apparently the District Attorney had decided that this conduct was actionable under Pennsylvania law.

property rights but rather called the police with the intention of interfering with its employees' right to engage in Section 7 activities. The Employer did not interfere with the Union supporters distributing "Fairness" stickers and flyers to casino patrons as they stood in front of the building. Indeed, the Employer is not alleged to have committed any other unfair labor practices during the incident.²⁶ Thus, in light of the present circumstances, we conclude that the Employer did not violate Section 8(a)(1) by calling the police.²⁷

Therefore, based on the preceding analysis, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

²⁶ Evidence that the Employer had engaged in additional conduct coercive of employee Section 7 activity could demonstrate that it did not have a genuine concern when summoning the police but, rather, was solely interested in inhibiting employees from engaging in conduct protected by the Act.

²⁷ The Board also has addressed the issue of whether an employer is shielded from violating Section 8(a)(1) by calling the police in response to labor protestors because such conduct is direct petitioning of the government that is protected under the First Amendment pursuant to the *Noerr-Pennington* doctrine. See *Venetian Casino Resort*, 357 NLRB No. 147, slip op. at 1 (2011), *enf. denied and remanded*, 793 F.3d 85 (D.C. Cir. 2015). The Board determined that calling the police did not constitute direct petitioning of the government under the *Noerr-Pennington* doctrine. *Id.*, 357 NLRB No. 147, slip op. at 3-4 (finding employer called police simply to remove union protestors and was not petitioning government to "seek passage of a law or a rule, or a significant policy decision regarding enforcement," to which federal courts have limited application of the doctrine). On appeal, the D.C. Circuit disagreed and held that that the employer's resort to the police was protected petitioning activity. 793 F.3d at 90 ("we conclude 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 the case to the Board to decide whether the employer's conduct was a sham petition and, therefore, not protected by *Noerr-Pennington*. 793 F.3d at 92. In light of our ultimate conclusion in this case, we need not address these federal constitutional issues here.