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Calling the cops during a labor dispute

By Michael R. Lied

Michael R. Lied, of Howard & Howard Attorneys PLLC, has practiced employment, labor and immigration law for more than 30 years. A frequent author and lecturer on these subjects, he is former chair of the Illinois State Bar Federal Civil Practice Section Council and Employment Law Section Council. He can be reached at mlied@howardandhoward.com and 309-999-6311.

In February 1999, a labor dispute between the Venetian Casino Resort and two labor unions reached a boiling point. The Nevada Department of Transportation issued the unions a permit to hold a demonstration against the Venetian on a temporary walkway and on one lane of the Strip.

A representative of the Venetian spoke with the Clark County district attorney. The Venetian took the position that the temporary walkway was its private property and that the unions had no right to demonstrate there.

The district attorney said he would not enforce Nevada's trespass law against the demonstrators.

The Venetian's representative then met with police officials to further their cause.

Those officials explained that police officers would attend the demonstration to protect public safety but would not arrest the demonstrators for trespass.

As more than 1,000 demonstrators marched on the walkway, the Venetian played a recorded message over a public address system. The message stated that the demonstrators were subject to arrest for trespass. The Venetian's security guards placed the demonstration's leader under citizen's arrest.

The Venetian asked police officers at the demonstration to issue criminal citations to the demonstrators and to block them from the temporary walkway.

The Venetian filed suit for injunctive and declaratory relief against the unions and various government entities.

The U.S. Court of Appeals for the District of Columbia Circuit ultimately held that the temporary walkway was a public forum subject to First Amendment protections and that the Venetian had no right to impede public access to the walkway.

The unions, in turn, filed unfair labor practice charges.

The National Labor Relations Board determined that the Venetian had committed an unfair labor practice in violation of the National Labor Relations Act. The Venetian sought judicial review.

Under the Noerr-Pennington doctrine as it applies in the labor law context, employer conduct that would otherwise be illegal may be protected by the First Amendment when it is part of a direct petition to government.

The First Amendment's petition clause protects "the right of the people ... to petition the government for a redress of grievances."

Whether conduct constitutes protected petitioning activity depends not only on its effects, but also on the context and nature of the activity.

The court concluded that the act of summoning the police to enforce state trespass law was a direct petition to government subject to protection under the Noerr-Pennington doctrine.

The doctrine, however, does not cover activity that was not genuinely intended to influence government action.

While "genuine" petitioning is immune from Section 8(a)(1) liability under the Noerr-Pennington doctrine, "sham" petitioning is not. A petition is a sham if it is objectively baseless and is brought with the specific intent to further wrongful conduct through the use of governmental process.

The Venetian argued that its request for assistance from the police officers at the scene was a valid attempt to secure its private property rights.

The court refused to reach that issue. In its 2011 decision and order, the NLRB never addressed whether the Venetian's attempt to summon the police constituted a sham petition. That issue was remanded for the board's consideration.

The case is *Venetian Casino Resort LLC v. National Labor Relations Board*, 2015 W.L. 4153872 (D.C. Cir.).

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