UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 05-1396 & 05-1439

VENETIAN CASINO RESORT, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

LOCAL JOINT EXECUTIVE BOARD of
LAS VEGAS, CULINARY WORKERS LOCAL 226
and HOTEL EMPLOYEES LOCAL 165

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Venetian Casino Resort, LLC ("the Company") to review an order of the National Labor Relations Board issued against the Company on September 30, 2005, and reported at 345 NLRB No. 82. (A 383-92.)[1] The Board has cross-applied for enforcement of its order. The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices. The Board's order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Court has jurisdiction under Section 10(e) and (f), which permits any person aggrieved by a Board order to seek review in this Court.

The Company petitioned for review on November 12, 2005, and the Board cross-applied for enforcement on December 5, 2005. Those filings were timely; the Act imposes no time limit on them. Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165 ("the Union"), the charging party below, has intervened in opposition to the Company's petition and in support of the Board's cross-application.

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[1] "A" references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably determined that the Union's demonstration was protected activity and that the Company violated Section 8(a)(1) of the Act by threatening and seeking the arrests of demonstrators for allegedly trespassing on a sidewalk where they had a constitutionally protected right to be.

APPLICABLE STATUTES

All applicable statutes are contained in an addendum to the Company's brief.

STATEMENT OF THE CASE

Based upon a charge filed by the Union, the Board's General Counsel issued an unfair labor practice complaint alleging that the Company violated Section 8(a) (1) of the Act (29 U.S.C. § 158(a)(1)) by threatening and seeking the arrest of union demonstrators for allegedly trespassing on a sidewalk on which the Ninth Circuit has determined that they had a constitutional right to be. Following a hearing, a Board administrative law judge issued a decision finding merit to the complaint allegations. The judge found that the union demonstration was protected under the Act as the "opening salvo" in an effort to protest the Company's labor policies and insure that the Venetian operated union. The judge further found that the Ninth Circuit's decision in a related proceeding conclusively established that the Company had no right to exclude the demonstrators from the

temporary sidewalk on the Company's property. The judge also found that the Company's actions on the day of the demonstration in threatening and attempting to cause the arrest of demonstrators were not bona fide constitutionally protected pre-petitioning or petitioning of the government. The governmental authorities had already made clear that they would take no action to enforce the Company's claimed right to exclude demonstrators from the sidewalk, and so the Company's actions on the day of the demonstration constituted violations of the Act and were not entitled to constitutional protection. The Board agreed. The pertinent facts follow.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. In Securing Approval of its Plans to Build the Venetian, the Company Promises to Build a Replacement Sidewalk on its Property and To Keep the Sidewalk Open for Public Use

The Company operates the Venetian, a mega-resort located on Las Vegas Boulevard in Las Vegas, Nevada, the main street in Las Vegas otherwise known as "the Strip." The Venetian was built in 1999 after the Company acquired and demolished a much smaller unionized hotel, the Sands Casino and Hotel ("the Sands"). When the Company attempted to secure approval of its development plans for the Venetian in 1997, the Clark County Council determined that it would

be necessary to widen the Strip in front of the Venetian to accommodate the additional traffic that was expected. Enlarging the Strip in this fashion required using all state-owned property fronting the Venetian, including, most importantly, the property on which the public sidewalk adjacent to the Strip was sited. (A 385; 289-91.)

To secure the Council's approval of its development plan, the Company was constrained to commit in writing that it would construct and maintain a replacement sidewalk on its property and permit public access and use of that sidewalk without restriction. The Union participated in the approval process, and pressed the Council to require that the sidewalk remain open to union activities that would be permissible on public property. With its development plan approved, the Company then entered into an agreement with the state department of transportation ("the NDOT") for widening the Strip and constructing the sidewalk as per its pledge to the Council. The Company's agreement with NDOT specified that the property upon which the sidewalk would be constructed would belong exclusively to the Company, with the State holding no right of way or easement of any sort. At the same time, the Company pledged to construct a sidewalk that would adjoin the public sidewalks on either end of its property and

to keep the sidewalk open to public use and unobstructed. (A 385; 77-78, 251-52, 261-63.)

B. The Union Publicizes Its Intent To Hold a Mass Demonstration To Protest the Company's Labor Policies and to "Take the Sidewalk Back;" the Clark County District Attorney and a Police Department Representative Inform a High-Ranking Company Executive that They Will Treat the Sidewalk as a Public Forum and Not Enforce the Criminal Trespass Statute Against Peaceful Demonstrators Absent a Court Order

In early February 1999, the first of a series of front-page articles appeared in a Las Vegas newspaper discussing the Union's intent to hold a massive demonstration on the sidewalk in front of the Venetian to "take the sidewalk back" and make clear the Union's dispute with the Venetian's labor policies, beginning with the Company's "refusal to give workers who were let go when the Sands Casino and Hotel was demolished first crack at Venetian jobs." (A 386; 335, 338.) As reported, the Union saw the battle over the sidewalk as the "opening salvo in the union's stepped-up campaign against the $1.2 billion Venetian as it prepares to open doors without a union contract." (A 334.) The articles also included representations that the Company's owner had claimed the right to exclude the Union from the sidewalk, and had refused the Union's request that he remain neutral in the Union's plans to organize the Venetian's workers, telling the

Union that he believed the Venetian had "put together a wage and benefit package for Venetian employees that is superior to the Union's." (A 335, 338.)

With the battle lines thus drawn, attorney David Friedman, a close aide to the Company's owner and CEO met with County District Attorney Stewart Bell, well in advance of the March 1 demonstration. Bell informed Friedman that his office would treat the sidewalk fronting the Venetian as a public forum and would not enforce the criminal trespass statute as to the sidewalk unless and until a court were to rule otherwise. Bell made it clear that his office had directed the police not to arrest peaceful union demonstrators for criminal trespass. Friedman left the meeting certain that he correctly understood that the district attorney and police would take no action to enforce the Company's claimed right to exclude peaceful demonstrators under the state's criminal trespass statute without a court order. Friedman then met with a high ranking official in the police department who confirmed what Bell had said. Unbeknownst to the Company, the County issued the Union an event permit for the March 1 demonstration.
(A 386; 98-100, 149-54.)

On March 1, Union Representative Glen Arnodo arrived at the sidewalk about an hour before the demonstration was scheduled to begin. A company representative approached and read to Arnodo the criminal trespass statute. The

demonstration included about 1,000 individuals, many displaying T-shirts or pins identifying themselves as affiliated with various unions including the union Arnodo represented. Many carried picket signs, which included a depiction of a smaller poster with a photograph of the Company's owner and the words "PRIVATE SIDEWALK PERMIT REQUIRED, NO TRESPASSING" written on it, with the words "UNION RIGHTS/CIVIL RIGHTS/ONE AND THE SAME" framing it. (A 386; 24, 27-30.)

The demonstrators repeatedly chanted "Union," "USA," and "Who owns the sidewalk? Union sidewalk." Other oft-repeated chants included, "Venetian no, Union yes," and "Hey, hey, ho, ho, union busting's got to go." (A 386; JTX5.)[2] Towards the end of the demonstration, there were a number of speeches touching on themes mentioned in the newspaper reports. One speaker remarked that the Venetian should be operating "one hundred percent union." Another said that all former Sands employees should have been given hiring priority over members of the public and that despite the "new name," a hotel on the same property "should still be union." (A 386; JTX 5.)

[2] "JTX 5" is a DVD version of videotapes of the demonstration made and edited by the Company.

Throughout the demonstration, the Company repeatedly played a recorded message over loudspeakers asserting that the demonstrators were trespassing on private property, and were subject to arrest under Nevada's trespass statute. (A 386; JTX 5.) The Company also asked police officers to issue criminal trespass citations to demonstrators and to force their removal from the temporary sidewalk as trespassers on private property. As the Company expected, the police officers refused. At Friedman's direction, a company security guard sought to effect citizen's arrests of several demonstrators, including the demonstration's leader, Union Representative Arnodo; the police refused to cooperate, however, so no arrests were made. (A 386; 167-68, 293.)

C. The Company Unsuccessfully Seeks Declaratory and Injunctive Relief; the Ninth Circuit Holds that the Company Possesses No Right To Exclude Demonstrators from What It Concludes Is an Essentially Public Sidewalk Fronting the Venetian

Following the demonstration, the Company immediately filed an action in U.S. District Court seeking a declaratory judgment and preliminary injunction against County officials, the Las Vegas Police Department, and the Union. The Company's position was that the sidewalk fronting the Venetian was private property and in no sense a public forum; that it had an inviolate right to exclude the demonstrators from its property as trespassers; and that the actions of county

and city officials in granting the Union a permit and refusing to enforce the criminal trespass statute constituted an unconstitutional taking. The district court rejected those arguments. It found instead that the sidewalk constituted a public forum for constitutional purposes, which the Company had agreed to construct to replace a public sidewalk and to "serve[] the needs of the public," and therefore that the Company had no right "to exclude individuals . . . based upon permissible exercises of their right to expression under the First Amendment." (A 387; 253, 258).[3]

The district court accordingly entered a judgment denying the Company's motion for a temporary restraining order and preliminary injunction. (A 387; 261.) In an ensuing unreported decision, the district court issued an order denying the Company's motion for summary judgment and granting the motions for summary judgment filed by the Union and the intervenor, the American Civil Liberties Union of Nevada, declaring the sidewalk fronting the Venetian to be "a public

[3] The official cite for the district court's initial decision, which is included as reported in the joint appendix, is *Venetian Casino Resort v. Local Joint Executive Bd., Las Vegas*, 45 F.Supp.2d 1027, 1036 (D. Nev. 1999). The ensuing district decision ruling on the cross-motions for summary judgment was not made part of the record herein, and is not in the joint appendix.

forum." *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd.,* 162 LRRM 2075 (D. Nev. August 20. 1999).

On appeal, a divided panel of the Ninth Circuit affirmed. The Court concluded that:

> Given the historically public character of the predecessor's sidewalk, the replacement sidewalk's current public use, its similarity to and interconnection with Las Vegas's network of public sidewalks, and its dedication to public use under the Venetian's 1999 Agreement with the Department, . . . the Venetian's sidewalk constitutes a public forum subject to the protections of the First Amendment.

(A 388; 270.)[4] The Company subsequently petitioned for rehearing, and rehearing en banc, and, when that petition was denied, unsuccessfully petitioned the Supreme Court for a writ of certiorari. (A 388.) Based upon a charge filed shortly after the demonstration had been held, the instant proceeding followed.

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Members Liebman and Schaumber), in agreement with the administrative law judge, found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) when it threatened and sought the arrest of individuals engaged in a protected union

[4] The official cite for the Ninth Circuit's decision, which is included as reported in the joint appendix, is *Venetian Casino v. Local Executive Bd., Las Vegas*, 257 F.3d 937, 948 (9th Cir. 2001) (A 261-80.)

demonstration on the sidewalk fronting the Venetian, when the sidewalk in actuality constituted a constitutionally protected public forum. (A 14.)

The Board found that the demonstration was protected under the Act because it was to protest the Company's attitude and actions towards organized labor and to make clear the Union's resolve to see that the resort's operations were unionized once it opened. The Board further found that the Company had no property right to invoke because, pursuant to a binding ruling by the Ninth Circuit, the sidewalk was a constitutionally protected public forum. Finally, the Board found that the Company failed to establish that its actions on the day of the demonstration were immune from Board scrutiny as necessary predicates to its lawsuit seeking a declaratory judgment and injunction, which was not itself alleged or found to be an unfair labor practice. (A 383-84; 391-92.)

The Board's order directs the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A 384, 392.) Affirmatively, the Board's order directs the Company to post copies of a remedial notice. (A 384, 392.)

SUMMARY OF ARGUMENT

It is well settled that an employer violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) when it seeks to assert a property right that it does not possess to interfere with protected union activities. That is what the Board found the Company did here. The Ninth Circuit determined that the Company had no right to exclude demonstrators from the sidewalk fronting the Venetian, which it determined was a public forum for First Amendment purposes based upon the sidewalk's history, its essentially public function, and the Company's agreement with the NDOT. The Board was obliged to accept without question the Ninth Circuit's determination, as is this Court.

Contrary to the Company's contention, the Board's determination that the Union's demonstration constituted protected activity within Section 7 of the Act was eminently reasonable and based upon fully supported findings. Newspaper reports upon which the Company relied in assessing the demonstration's purpose could not have been clearer but that the demonstration was just the "opening salvo" in the Union's battle against the Company's labor policies and the Union's intent to see that the Venetian operated "100 percent" union. The Company's attempt to separate out what it mischaracterizes as an unprotected object--to open

the sidewalk for protected activities--from the larger union fight is artificial and unavailing. The Board had ample grounds for rejecting it.

The facts undermine the Company's claims that its actions in threatening demonstrators and attempting to cause their arrest were entitled to constitutional immunity as steps necessary to bringing its lawsuit or as petitioning activity itself. The Company knew to a certainty before the demonstration began that the authorities would not enforce the criminal trespass statute, but instead would treat the sidewalk as a public forum unless and until a court ruled otherwise. The Company therefore seemingly had everything it needed to bring a declaratory judgment and injunction action before the demonstration ever began. It made no attempt to even try to demonstrate to the Board that that was not the case. Therefore, the Board cannot be faulted for remaining "unconvinced" that the blatant acts of interference on the day of the demonstration qualified for immunity as necessary predicates to planned litigation. What was just said also answers completely the Company's claim that some of what it did--everything but the repeated threats made to demonstrators over the loudspeakers--constituted genuine petitioning of the government that should have been afforded constitutional immunity. The Company's own witness admitted that he knew to a certainty that the authorities would take no action when company representatives asked the

police to arrest demonstrators or to act on attempted citizen's arrests that company representatives sought to initiate. In that context, the Company's claim that those actions constituted genuine petitioning falls of its own weight.

ARGUMENT

THE BOARD REASONABLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY ATTEMPTING TO EXCLUDE PARTICIPANTS IN A PROTECTED UNION DEMONSTRATION ON A SIDEWALK THAT THE NINTH CIRCUIT HAS DETERMINED CONSTITUTES A PUBLIC FORUM FOR CONSTITUTIONAL PURPOSES

A. Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements that right by making it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7. An employer's conduct violates Section 8(a)(1) if it reasonably "tends to interfere with the employees' exercise" of those Section 7 rights. *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988). And, it is well settled that

that section is violated when an employer seeks to exclude from property individuals engaged in protected activity, absent a property right that subsumes the right to exclude. *See UFCW Local 400 v. NLRB*, 222 F.3d 1030, 1034 & n.5 (D.C. Cir. 2000) (employer violated Section 8(a)(1) by attempting to exclude union organizers from sidewalk, where lease terms failed to establish right to invoke trespass statute); *NLRB v. Schlegel Oklahoma, Inc.*, 644 F.2d 842, 843 (10th Cir. 1981) (employer unlawfully threatened to call the police to arrest picketer for engaging in protected activity on what the Board and court found to be public property).

Here, as we now show, the sidewalk in front of the Venetian was, per the Ninth Circuit, a public forum from which the Company had no right to prohibit members of the public from engaging in speech activity. Yet the Company took several actions that plainly tended to interfere with the Union's demonstration. Because that demonstration was protected by Section 7 of the Act, the Company's blatant and legally unjustified acts of interference with it were properly found by the Board to violate Section 8(a)(1)

B. The Ninth Circuit's Ruling Conclusively Established that the Sidewalk Fronting the Venetian Was a Public Forum, on Which the Union Was Entitled To Engage in Speech Activity

As noted in the Statement, the Ninth Circuit held that the sidewalk fronting the Venetian is part and parcel of the public sidewalk system along Las Vegas's main strip and constitutes a public forum for constitutional purposes. (A 270.) The Ninth Circuit rejected the Company's contention that its reservation of private property rights with regard to that sidewalk could somehow operate to convert what had always been a public sidewalk into a private one, when the agreement the Company had signed promised that the sidewalk would remain open and unimpeded to the public for its use. (A 268-69.) Rather, the court determined that constitutional imperatives required that the Company recognize that the sidewalk constituted a public forum. (A 269-70.)

The Board was obliged to give conclusive effect to the Ninth Circuit's ruling and so is this Court. Thus, while the Company insists otherwise (Br 38 n.11), the law could not be more clear that principles of res judicata and collateral estoppel preclude further consideration of the issue, even if, as the Company incorrectly asserts (Br 37-41), that court "'may have been wrong.'" *See Dynaquest Corp. v. U.S. Postal Service*, 242 F.3d 1070, 1075 (D.C. Cir. 2001) (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981)). The

dispositive fact is that the Company had the opportunity to, and did, fully litigate the issue of its right to exclude union demonstrators from the sidewalk before the Ninth Circuit, in a case that arose out of the very same union demonstration involved in this case. No amount of legalese or tortured analysis by the Company, such as its vapid attempt (Br 38 n.11) to characterize the Ninth Circuit's decision as "involving 'unrelated subject matter,'" can change the controlling effect of the Ninth Circuit's decision that the Company had no right to exclude the union demonstrators from the sidewalk.

C. Substantial Evidence Supports the Board's Findings that the Company's Actions Reasonably Tended To Interfere with Protected Activity

The company actions found unlawful by the Board--repeatedly playing a message telling demonstrators (incorrectly) that they were subject to arrest, summoning the police, and attempting to place demonstrators, including a union official, under citizen's arrest--ran afoul of Section 8(a)(1) of the Act, whether the Company avowedly expected its actions to be effective or not. As shown, the test for whether acts of interference with protected rights violate the Act does not depend on the employer's subjective bad faith, but rather on whether its conduct had a reasonable tendency to interfere with, restrain, or coerce individuals in the exercise of Section 7 rights. Thus, the Company's claims (Br 28-29) that it did not

expect the demonstration's leaders to abandon the demonstration under threat of arrest, and did not expect the police to arrest anyone, are legally irrelevant. It was sufficient that the Company's actions were likely to have an impermissible effect on the exercise of protected rights, which plainly was the case.

Indeed, the Company's insistence (Br 28-29) that it knew that the demonstration's leaders were willing to be arrested in order to vindicate their right to engage in a protected protest in no sense establishes that the Company's actions lacked a likely impermissible effect. Subjecting the demonstration's leaders to the specter of arrest imposes a cost on the exercise of protected rights that clearly offends Section 8(a)(1) of the Act. That those leaders were willing to incur such costs does nothing to detract from the illegality of the Company's actions in seeking to extract it. And, the Company's arguments do nothing to address the impact its actions were likely to have had on the other demonstrators, and there were more than 1,000 of them, whose Section 7 rights were implicated in the demonstration, not to mention the audience of potential Venetian hirees who comprised at least part of the audience towards whom the Union's demonstration was addressed.

What was just said also answers the Company's claim (Br 28) that the police were on record that they would not cooperate with the Company and would

not make criminal trespass arrests based upon the Company's claimed property rights. There is nothing in the record to suggest that the demonstrators, from their leaders on down, were as aware as the Company that the authorities were not prepared to make criminal-trespass arrests if the Company requested them. Thus, the potential impact on the exercise of protected rights that the Company's pronouncements and actions were likely to have had on the demonstrators cannot be gainsaid, whether the demonstrators were nevertheless willing to continue with their activity or not.

As the Board reasonably found, moreover, the union demonstrators at whom the Company's actions were directed were engaged in protected activity. It is well settled that the task of determining whether conduct is protected under the Act "is for the Board to perform in the first instance," and that the Board's reasonable determinations must be accepted on review, if based upon underlying findings supported by substantial evidence. *See NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829-30 (1984); *Prill v. NLRB*, 755 F.2d 941, 950 & nn.56 & 57 (D.C. Cir. 1985) (noting, *inter alia*, that the "Court has upheld the Board's broad construction of section 7 in a variety of contexts"). By those standards, the Board's finding here that the demonstration was protected and that the Company unlawfully interfered with it are unassailable.

Section 7's protections plainly are broad enough to reach attempts by employees through their representatives "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex,* 437 U.S. at 565. And, it goes without saying that unionized employees have a protected interest in attempting to organize unrepresented workplaces and publicize what they believe to be unfair or improper treatment of fellow workers at those workplaces. *See UFCW v. NLRB*, 307 F.3d 760, 768-69 (9th Cir. 2002) and cases cited. Organizing the unorganized not only reduces the specter that unionized employers might be resistant to bargaining proposals for fear of being undercut by nonunion competitors, but also serves other current-member interests. Thus, increasing the number of available union jobs is likely to increase the job security and advancement prospects of employees who might otherwise be constrained against making job changes because important benefits such as pensions and health insurance are not portable. *Id*. In a similar vein, unionized employees have a protected interest in making common cause with employees of employers who, at least in the minds of the employees and their representatives, have treated employees unfairly. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978) (the Act "protect[s] employees when they engage in otherwise proper concerted activities

in support of employees of employers other than their own"); *United Services Auto Ass'n v. NLRB*, 387 F.3d 908, 914 (D.C. Cir. 2004) (employee engaged in protected activity when he distributed a flyer "urging support for laid off employees and selection of employees for layoff").

Here, as the Board found (A 386), the Union's demonstration had just such a focus and therefore was protected under Section 7 of the Act. The newspaper reports that preceded the demonstration made explicit from the outset that the demonstration was a "public showdown" in an "escalating labor battle" and an "opening salvo" in a predicted fight to make sure that the Venetian operated 100 percent union after it opened. (A 334.) As reported, the Union demonstration was animated by what the Union rightly or wrongly saw as evidence of the Company's hostility to unionization. As reported, the Union was intent on protesting unfair labor policies that began with the Company's "refusal to give workers who were let go when the Sands Casino and Hotel was demolished first crack at Venetian jobs." (A 335.) The Union saw as further evidence of the Company's hostility to union and employee interests the Company's declared intent to keep union organizers off what the Union correctly regarded as the equivalent of a public sidewalk, and the Company's bold pronouncement, in response to a reported request for a neutrality agreement, that it intended to "put together a wage and

benefit package for Venetian employees that is superior to the Union's." (A 335, 338.)

As the Board emphasized, the demonstration held on March 1 was true to that blueprint. Demonstrators wore pins and T-shirts that showed their affiliation with various unions, carried signs that made clear that the Union was claiming the right to conduct activities geared to unionizing the Venetian on the sidewalk fronting it, and chanted slogans clearly delineating that the battle lines for organizing were being joined: "Venetian no, Union yes," and "Hey, hey, ho, ho, union busting's got to go." (A 386; JTX 5.) The content of the speeches showed the protected character of the demonstration even more pointedly: speakers said the Venetian should be "one hundred percent union;" that former Sands employees should have been given hiring priority; and that the construction of a new facility did nothing to change the resolve of unionized employees in the city that the resort "should still be union." (A 386; JTX 5.)

There is no merit to the Company's claim (Br 29-34) that the demonstration nevertheless should be considered unprotected because, according to the Company, its principal focus was on opening the sidewalk. To begin with, the objective of "opening the sidewalk" was from the start correctly portrayed in the media as part and parcel of an "escalating labor battle over the Venetian mega

resort." (A 334.) That labor dispute was depicted in the press as implicating acts and policies that the Union viewed as hostile to unionization, including the Company's announced intent to keep union representatives off a sidewalk where they had every right to engage in protected organizing and publicity activities.

As has long been recognized, the place of work is the "uniquely appropriate" venue for communicating with employees and others about union issues. *Republic Aviation Corp. v. NLRB*, 346 U.S. 793, 798 (1945). The Company correctly points out that outside union organizers and other representatives generally have no right of access to the workplace itself. *See Lechmere Inc. v. NLRB*, 502 U.S. 527, 538 (1992). Accordingly, the importance of securing access to public sidewalks adjoining that property for the purposes of organizing and publicizing a labor dispute cannot be gainsaid. Plainly then, the Company's attempt to artificially divorce the opening-the-sidewalk issue from the greater labor dispute that the Union was seeking to ventilate ignores the reality that they are and always were of one piece.

Equally unavailing is the Company's further claim (Br 6) that its actions could not be deemed unlawful in light of the testimony of Company Attorney Friedman to the effect that, having read newspaper reports concerning the planned demonstration, he believed in good faith that the demonstration implicated no

protected conduct. (A 136-51, 160.) Friedman could not disclaim that he knew that the Union was in the forefront of the demonstration. That being said, the Board reasonably concluded that the Company could not shield itself from the reasonably foreseeable consequences of its actions based upon Friedman's avowed misreading of the articles. *See NLRB v. Burnup & Sims*, 379 U.S. 21, 23-24 (1964) (good faith but mistaken belief that employees engaged in protected walkout had engaged in misconduct no defense). Indeed, any other conclusion, on facts such as are present here, would provide an easy means for an employer to escape accountability based upon what amounts to little more than a claim of simple negligence or willful ignorance.

Finally, the Company's claim (Br 30) that there could be no protected activity at the Venetian's property line because the Venetian had no employees at the time is a poor play on words. As shown, the Union demonstration was protected because it directly implicated the protected rights of the unionized employees at other hotels and resorts, not to mention those of former Sands employees who had worked at that very site, but whom the Company had refused to give preferential hiring rights. *See Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 27 (D.C. Cir. 2001) (area standards protest protected even though project had not started and wages and benefits had not been established). The Board

therefore had no occasion to concern itself with whether the Union could derivatively assert the protected rights of prospective employees of the Venetian. Rather, as noted, the employees whom the Union already represented had the direct protected right to act through their chosen representative to advance their protected interests, which is exactly what the Board reasonably concluded occurred here.

In sum, the demonstration was an "opening salvo" in an on-going labor dispute and was aimed at gaining the support of the prospective labor pool from which the Venetian would have to draw, and also from the consuming public, whom the Union knew had many other unionized options from which to choose. As such, the demonstration was clearly protected within the meaning of Section 7 of the Act.

D. The Board Correctly Found that the Company Failed To Establish that Its Actions in Repeatedly Telling Demonstrators that They Would Be Arrested as Trespassers and Attempting To Cause the Arrest of Demonstrators Through the Police or Resort To Self-Help Were Immune from Board Scrutiny Because Those Actions Were Necessary Prerequisites to Its Constitutionally Protected Right To Sue

In *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), the Supreme Court, to avoid a potential collision with constitutional protections, held that Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) could not properly be construed to make it an unfair labor practice for an employer to sue in retaliation against a union's protected activities unless the lawsuit were shown to be both objectively baseless and unlawfully motivated. In so holding, the Court concluded that the long-recognized immunity from antitrust liability afforded to a full range of genuine efforts to petition the government was applicable to Board scrutiny of lawsuits that are aimed at conduct protected under the Act, even if such lawsuits proved to be unmeritorious.

Consistent with *BE & K*, the General Counsel's complaint did not allege, and the Board did not find, that the Company's declaratory-judgment lawsuit violated the Act. The Company goes further, however, arguing (Br 23-29) that its

other acts of interference with the demonstration were privileged as "prelitigation activities." The Board correctly rejected that argument.

The broad immunity recognized as attaching to efforts to directly petition the government under the so-called *Noerr-Pennington* doctrine does not necessarily apply to actions undertaken in preparation for such petitioning.[5] *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988). Rather, the extent to which *Noerr-Pennington* immunity should apply depends upon the totality of factors including, most prominently, the extent to which the alleged preparatory actions are actually intertwined with the petitioning activity itself. *Id*.

The Board reasonably rejected (A 390-91) the Company's argument that it was entitled to *Noerr-Pennington* immunity because its actions were "incidental to and inextricably intertwined with Venetian's filing a federal court lawsuit . . . to vindicate its Fifth Amendment property rights." Simply stated, the Board

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[5] *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 137-38 (1961) and *Mine Workers v. Pennington*, 381 U.S. 657, 669-72 (1965) are the lead cases in what has developed into a far reaching constitutional immunity afforded to activities that otherwise might be deemed to violate the antitrust laws but that constitute genuine efforts of individuals and organizations to "freely inform the government of their wishes." The immunity afforded to genuine petitioning activities is often referred to as "*Noerr* immunity" or "*Noerr-Pennington* immunity."

correctly remained unconvinced that the Company "would have been at all foreclosed from exercising its right to petition the courts through a lawsuit without first interfering with the rights of union demonstrators to participate in the rally." To the contrary, the testimony of David Friedman, the assistant to the Venetian's chairman, established that the authorities in the persons of the district attorney himself and a ranking representative of the police department had made it crystal clear well in advance of the demonstration that no arrests would be made and that they would regard the sidewalk as a public forum, unless and until a court were to rule otherwise. (A 136-141.) Neither before the Board nor in this Court has the Company seriously argued, that, absent its actions on the day of the demonstration, its lawsuit would have lacked some necessary predicate--much less one that could not be satisfied by having Friedman attest to the emphatic statements made by the district attorney and a police representative days before the demonstration actually took place. Accordingly, the Company was not entitled to *Noerr-Pennington* immunity for actions not shown to have been "incidental and inextricably intertwined with its [immune] lawsuit," but that rather were superfluous to it.

The Company's attempt to fault the Board for failing to take account of Friedman's testimony that he genuinely believed that the Company's actions were necessary predicates to the lawsuit is just another way of arguing that *Noerr*-

Pennington immunity applies to activity that was preliminary to the filing of its lawsuit. However, we have just shown that the Company failed to establish that the activities in question were necessary prerequisites to the filing of its lawsuit, or even to explain its basis for its purported belief. Since the Company's actions in that regard when undertaken to quell protected activity "have traditionally been objects of [Board] scrutiny" (*Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501-03 (1988)), the Company cannot fault the Board for concluding, as it did, that no case for *Noerr-Pennington* immunity had been established.

The Company fares no better in mischaracterizing (Br 24) its actions in asking the police to arrest demonstrators and attempting to make citizen's arrests on its own as petitioning activities in and of themselves. As just noted, Friedman's own testimony establishes that he fully understood that the police would not cooperate with the requests for arrests and would not issue required complaints when the Company's agents sought to perfect their attempts to effect citizen's arrests. Those actions therefore could in no sense be deemed to be genuine petitioning because the Company knew to a certainty that they would not

result in government action.[6] Rather, the only foreseeable effect of the Company's public display was to chill demonstrators in their exercise of protected rights by leading them to fear that they or their leaders would be arrested. The Company cannot seriously contend that such actions were genuine petitioning arguably entitled to *Noerr-Pennington* immunity.

The Board therefore had no occasion to address whether the choice of calling the police to assert avowed property rights an employer does not possess could, in some circumstances, insulate the employer from accountability under the Act for interfering with protected rights. It bears mentioning, nonetheless, that whether the choice to ask the authorities to arrest individuals engaged in protected conduct, as opposed to suing directly for injunctive or declaratory relief, is entitled to full *Noerr-Pennington* immunity or should be subjected to some lesser immunity is not so susceptible of easy resolution as the Company suggests. *BE & K* itself only concerned litigation, and the Board has a strong and longstanding countervailing interest in preventing employees engaged in protected activity from

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[6] The Company obtained that knowledge through attorney Friedman's meetings with the district attorney and police officials. There was no allegation that the Company violated the Act by requesting and participating in those meetings.

being subjected to, or threatened by, legally unjustified on-the-spot police intervention to enforce unfounded claims of property rights.

Indeed, the tension between legitimate property rights and the exercise of protected statutory rights is implicit in the Act itself, and has infused litigation before the Board for more than 50 years and continues to this day. *See Baylor University Medical Center v. NLRB*, 578 F.2d 351, 354 n.23 (D.C. Cir. 1978) ("[n]o-solicitation rules have long been analyzed in terms of balancing the property rights of the employer and the organizational rights of the employees"); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568, 581-82 (1978) (Rehnquist, J., dissenting) (same). Moreover, the actions of employers in seeking to invoke criminal trespass statutes by calling the police to impede the exercise of protected rights have long been at the vortex of Board unfair labor practice cases. *See, for example, Lechmere Inc. v. NLRB*, 914 F.2d 313, 325 (1st Cir. 1990) (employer violated Section 8(a)(1) by endeavoring to have police remove union representatives from public property), *reversed in part on other grounds*, 502 U.S. 527 (1992); *Montgomery Ward & Co., Inc. v. NLRB*, 692 F.2d 1115, 1119 (7th Cir. 1982). We know of no Board or court case resolving the issue that the Company would raise but that this case does not present--whether a genuine attempt to invoke the state's police power to improperly interfere with protected activities where no right to

exclude exists, or is arguably overridden by statutory interests, is entitled to constitutional immunity no matter what its impact on statutory rights.

CONCLUSION

For the foregoing reasons, the Court should enter a judgment denying the petition for review and enforcing the Board's order in full.

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