Venetian Casino Resort, LLC *and* Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union.[1] Case 28–CA–16000

September 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 12, 2003, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs.[2]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified.

At issue in this case are the Respondent's actions on March 1, 1999, when, in response to a union demonstration on the sidewalk in front of the Respondent's hotel and casino, then under construction, the Respondent summoned the local police, placed a union official under "citizen's arrest," and took other actions to interfere with the demonstration. At the time, the Respondent and the Union disputed the legal status of the sidewalk: the Respondent contended that it was private property, while the Union and its supporters contended that it was public. In non-Board litigation commenced by the Respondent after the demonstration, the courts determined that "the Venetian's sidewalk constitutes a public forum subject to the protections of the First Amendment." *Venetian Casino Resort v. Local Joint Executive Board*, 257 F.3d 937, 948 (9th Cir. 2001), cert. denied 535 U.S. 905 (2002).

The administrative law judge found that, because the sidewalk was a public forum and the union demonstrators were involved in protected activity, the Respondent's actions in response violated Section 8(a)(1) of the Act. We agree.

The judge stated: "Having been unsuccessful at [obtaining] a 'neutrality agreement,' the Union obviously decided to take its 'labor dispute' directly to prospective employees and to the general public." The "message" it sought to convey to potential employees, the judge found, was "that the facility should be operated under a union contract and, that if hired by the Respondent, these new employees should become union members and support the Union." The judge also found that the Union sought to convey a message to members of the general public, namely "to educate them as to the nature of the Union's dispute with the Respondent."[4] We affirm those factual findings, and the judge's conclusion that the Union's attempt to convey those messages was protected by Section 7.[5] Accordingly, we agree with his ultimate finding that the Respondent's efforts to interfere with the Union's conduct that day violated Section 8(a)(1) of the Act.[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Venetian Casino Resort, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1.

"The Respondent, Venetian Casino Resort, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from"

[1] We have amended the caption to reflect the disaffiliation of the Hotel Employees and Restaurant Employees International Union from the AFL–CIO effective September 14, 2005.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] The judge observed that the Union's message vis-à-vis members of the general public was "analogous to 'area standards' activity." We also note that the record reflects that the demonstrators carried signs reading "Union Rights"; chanted slogans such as "Venetian no, Union yes" and "Hey, hey, ho, ho, union busting's got to go"; and speakers at the demonstration complained that the Venetian should be operated on a union basis and that former Sands' employees were not offered priority hiring rights at the facility.

[5] We therefore need not rely on the judge's implicit factual finding that a purpose of the Union's demonstration was to persuade the Respondent to enter into a neutrality agreement or his statement that "an effort to obtain a 'neutrality agreement' . . . would constitute union activity in the most basic sense." However, assuming arguendo that the demonstration had that purpose, the Respondent does not argue that such a purpose is not protected by the Act.

[6] Member Schaumber agrees with his colleagues that the picketing in this case was protected union activity, and that the Respondent violated Sec. 8(a)(1) by interfering with that activity. He agrees with Chairman Battista that serious legal issues warranting careful consideration are presented when a union engages in picketing to obtain a neutrality/card check agreement. Because the Respondent has not presented these issues to the Board, he finds it unnecessary to reach them in deciding this case.

2. Substitute the following for paragraph 2.

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

CHAIRMAN BATTISTA, concurring.

I join in the decision that the picketing was protected, and that the Respondent interfered with that activity. However, I note that the union agent testified that the picketing was to obtain a neutrality/card check agreement. The judge found that the picketing was for that object, and he reached the legal conclusion that picketing for that object is protected activity.

I join my colleagues in their nonreliance on the factual finding, and I have grave doubts about the correctness of the legal conclusion. Where, as here, the employer has not hired any employees, it may well be that a neutrality/card check agreement would be unlawful, and/or that picketing for such an agreement is unprotected.

However, the Respondent does not defend on that basis. Indeed, it argues that this was not the object of the picketing. The Respondent defends on the basis that the sidewalk was its private property. My colleagues correctly reject that defense.

Thus, the picketing was unquestionably union activity. The element that might remove this activity from the protection of the Act (see above) is not being relied upon by the Respondent. In these circumstances, I agree that the interference with the activity violated Section 8(a)(1).

Richard A. Smith, Esq., for the General Counsel.
Richard S. Rosenberg, Esq., of Universal City, California, for the Respondent.

DECISION

Statement of the Case

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Las Vegas, Nevada, on April 3, 2003. Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO (the Union or the Charging Party) filed an unfair labor practice charge in this case on August 26, 1999. Based on that charge, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint on January 23, 2003.[1] The complaint alleges that Venetian Casino Resort, LLC (the Respondent, the Venetian, or the Employer) violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally, and to file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,[2] I now make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a Nevada limited liability company, with an office and place of business in Las Vegas, Nevada (the facility), where it has been engaged in the operation of a hotel and casino. Further, I find that during the period from on or about May 4 through August 26, 1999, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000. During the same period of time, the Respondent purchased and received at its facility goods valued in excess of $50,000 directly from points located outside the State of Nevada.

Accordingly, I conclude that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. The Dispute

The complaint alleges that on March 1, 1999,[3] on the sidewalk along the front of the Respondent's facility, the Union conducted a demonstration against the Respondent. At the time, the Respondent's hotel and casino were under construction. Further, the complaint alleges that the Respondent's security guards[4] summoned the Las Vegas Metropolitan Police and requested that demonstrators be issued citations and excluded from the sidewalk in front of the Respondent's facility. It is also alleged that the security guards caused the recording of a trespass message and the playing of the message over a loudspeaker during the demonstration. Additionally, the complaint alleges that during the same demonstration the security guards

[1] A complaint in this case originally issued on November 30, 1999. On January 7, 2003, the Acting Regional Director approved an informal settlement agreement between the parties in this matter. However, subsequently, the Regional Director determined that the terms of the settlement agreement were not being complied with, and issued an order setting aside the settlement agreement. The complaint currently before me was then issued.

[2] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

[3] All dates are in 1999 unless otherwise indicated.

[4] The parties stipulated that for purposes of the complaint allegations, the security guards described in the complaint were acting at the behest of the Respondent and, therefore, were agents of the Respondent within the meaning of Sec. 2(13) of the Act. (Jt. Exh. 1.)

informed Union Business Agent Glen Arnodo that he was being placed under citizen's arrest, and the following day contacted the police to make a report of the incident.[5] It is the contention of the General Counsel that this conduct on the part of the Respondent interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act.

The Respondent acknowledges the actions of its security guards as alleged in the complaint. However, it denies that these actions in any way interfered with, restrained, or coerced employees in the exercise of Section 7 rights. The Respondent denies the commission of any unfair labor practices. It contends that its actions of March 1, 1999, and thereafter were a lawful exercise of its private property rights under the Fifth Amendment to the Constitution of the United States.

For the most part, the facts in this case are not in dispute.[6] What remains in dispute, however, is a legal issue. That issue is whether the Respondent's efforts to remove demonstrators, who were allegedly engaged in union organized expressive activity, from the sidewalk along the front of the Respondent's facility constituted a violation of Section 8(a)(1) of the Act.

B. The Facts

The Venetian Casino Resort is a luxury hotel-casino located in Las Vegas, Nevada, on Las Vegas Boulevard, a State highway commonly known as the "Las Vegas Strip." The Respondent's facility opened to the public during May 1999. Previously, the property on which the facility now sits had been occupied by another hotel-casino. The Respondent obtained approval to demolish the hotel-casino formerly occupying the property and to construct a new hotel-casino. In February 1997, prior to the Respondent beginning construction on the facility, it entered into a "pre-development agreement" with Clark County, Nevada. Apparently, as part of that agreement, the Respondent agreed to abide by the results of a county-approved study assessing the effect of the new construction on vehicular and pedestrian traffic.

The traffic study was completed in September 1997, and it recommended widening Las Vegas Boulevard by one lane along the front of the Respondent's property. The additional traffic lane would displace what had been a public sidewalk, on State property, running alongside Las Vegas Boulevard. The widening of the roadway would encompass the full State right-of-way on Las Vegas Boulevard, leaving no remaining State property for a new public sidewalk. The county approved the traffic study[7] and agreed with the Respondent that it would be necessary for the Respondent to meet with the Nevada Department of Transportation (NDOT) to address the matter of pedestrian passage along the front of the Respondent's property on Las Vegas Boulevard, and access to the property.

The Respondent entered into negotiations with the NDOT, which culminated in an agreement on January 8, 1999. (Jt. Exh. 3, "Agreement" attachment.) The agreement requires the Respondent to "construct and maintain on its property along Las Vegas Boulevard South a private sidewalk connecting to public sidewalks on either side of its property." Under the terms of the agreement, it appears that the parties have specifically refrained from requiring the Respondent to dedicate a public right-of-way to the State for a new public sidewalk. To the contrary, every reference in the agreement to sidewalk explicitly affirms that it is "private." The agreement states that the Respondent "retains full rights inherent to the ownership of private property to the full extent permitted by the Fifth and Fourteenth Amendments." Further, it emphasizes that the State "is not taking any private property interest with this document."

The private nature of the sidewalk is also reflected in several other clauses in the agreement. For example, the Respondent is required to "keep and maintain, at its sole expense, the private sidewalk free of all weeds, noxious plants . . . and at all times in an orderly, clean, safe, and sanitary condition." Further, the Respondent is required to "absolve, indemnify, and defend" the State "from any and all cost, expense, or liability arising from the . . . use of the private sidewalk." The agreement offers only one potential future scenario under which the Respondent might be required to relinquish its property rights and to "dedicate [the] necessary right-of-way to the [State]" for a public sidewalk. That situation would arise only if the "private sidewalk" were to be "removed, altered, or abandoned."

It is clear to me from a reading of the agreement that by its terms the parties intended for the Respondent to construct a sidewalk on its private property that would remain the private property of the Respondent, but upon which the public would have access. This would allow the public to walk along the continuous sidewalks in front of the various hotel-casinos along Las Vegas Boulevard, including the Respondent's facility. It would also provide the public with access to the Respondent's facility. In my opinion, the agreement intended that this be done without requiring the Respondent to explicitly dedicate a public right-of-way for a new public sidewalk.

Subsequently, construction began on the Respondent's facility. As part of that process, the Respondent demolished the public sidewalk that had existed along Las Vegas Boulevard. This enabled the construction of the new lane of traffic as had been provided for in the previously agreed-upon traffic study. During the construction of the new hotel-casino, the Respondent had a temporary private walkway built within its private property in the area where the private sidewalk required by the agreement with the NDOT would ultimately be constructed.

In February 1999, the Respondent became aware that the Union intended to hold a demonstration at the facility to protest the Respondent's labor policies.[8] David Friedman, assistant to

[5] This allegation in par. 5(b)(3) of the complaint appears as amended by counsel for the General Counsel at the hearing.

[6] In its answer, the Respondent denies the allegation in the complaint regarding the filing and service of the charge. However, the filing and service of the charge as alleged is established by the unrebutted admission into evidence of the original charge, docket letter, and affidavit of service for this case. See GC Exhs. 1(a) and (b).

[7] Apparently, the county approved the traffic study after a public hearing during which a number of county commissioners raised questions about whether the public would have the right to engage in expressive activity on any sidewalk constructed in front of the Respondent's facility. While it is somewhat unclear, it appears that there was no definitive answer given the commissioners, and no further action taken by the county regarding this issue.

[8] According to the testimony of Glen Arnodo, the Union's political director, the Union intended to picket the Respondent's construction

the chairman of the Venetian, testified that he obtained this information from a number of different sources, including various newspaper articles. (R. Exhs. 6–9.) In anticipation of demonstrators entering its private property, the Respondent surveyed its property lines and had the dividing line between the State property (Las Vegas Boulevard) and the Respondent's private property marked with an orange paint. Further, the Respondent had signs posted designating the temporary private walkway along the front of its facility as private property.

The demonstration occurred on March 1, 1999, at a time when the facility was still an active construction site. There were in excess of 1000 persons who participated in the demonstration, which was conducted over several hours in the late afternoon and early evening.

The demonstrators carried picket signs, chanted slogans, and walked in a loop back and forth along Las Vegas Boulevard.[9] Certain of the demonstrators wore T-shirts, buttons, or carried picket signs that designated the names of various unions, including the Charging Party. For much of the march the demonstrators were clearly walking on the temporary private walkway on the Respondent's property. (R. Exhs. 1 and 5.) Many of the picket signs contained a picture of the Respondent's chairman under the words "PRIVATE SIDEWALK." At the top and bottom of the signs were the words "UNION RIGHTS/ CIVIL RIGHTS/ ONE AND THE SAME." (Jt. Exh. 4.) The chants included the repetitive use of the word "Union," and "USA," and the words, "Who owns the sidewalk? We own the sidewalk," and "Who owns the sidewalk? Union sidewalk." (R. Exh. 5.) Additional chants included, "Venetian no, Union yes," and "Hey, hey, ho, ho, Union bustings got to go." (Jt. Exh. 5.) Toward the end of the demonstration, there were also speeches given by a number of individuals. One unidentified speaker is heard to remark to a group of demonstrators that the Venetian should be operating the property "one hundred percent Union." (Jt. Exh. 5.) Another unidentified speaker complains to the assembled demonstrators that former employees of the Sands Hotel and Casino (the previous occupant of the property) were not being given any greater right than the general public to apply for jobs at the Venetian. Further, this speaker says that although the property has a "new name," it "should still be Union." (Jt. Exh. 5.)

The county had previously granted the Union a permit allowing it to conduct the demonstration on March 1, 1999, on the "sidewalk in front of the Venetian hotel and casino and one north bound travel lane adjacent to sidewalk." (Jt. Exh. 3, "Application and Permit" attachment.) Further, both the Metropolitan Police Department and the district attorney, upon inquiry from the Respondent, had advised the Respondent that in their view demonstrators on the temporary private walkway would not be trespassing, as the walkway, although private property, constituted a public forum pursuant to the First Amendment to the Constitution of the United States.

Of course, the Respondent viewed the situation differently. As the demonstration commenced and the protesters began to walk along the temporary private walkway on its property, the Respondent had its security guards repeatedly play over loudspeakers a recorded message advising the demonstrators that they were trespassing on private property, were subject to arrest, and citing to them a Nevada State statute. The recording addressed the demonstrators as "culinary and union workers." (R. Exh. 5.) Additionally, the Respondent admits that it requested that the police issue citations to the demonstrators and exclude them from the temporary private walkway in front of the facility. Also, the Respondent admits that one of its security guards informed Glen Arnodo, union political director, that he was being placed under citizen's arrest for trespassing, and the following day agents of the Respondent contacted the police to make a report of the incident. (GC Exh. 2.)

Following the demonstration, the Respondent filed an action in the U.S. District Court seeking declaratory relief against the Government officials and the Union, alleging that their conduct had the effect of converting the Respondent's private property into a public forum, and thus amounted to a taking of its property in violation of the due process clause of the United States Constitution. The Respondent also filed a motion for a preliminary injunction against the Government officials, seeking to bar them from authorizing demonstrations on its property and from refusing to enforce its private property rights.

The District Court in *Venetian Casino Resort v. Local Joint Executive Board,* 45 F.2d 1027 (D.Nev. 1999), framed the issue before it as having "to consider whether a pedestrian walkway, located on private property parallel and adjacent to the Las Vegas Strip and connected at both ends to public sidewalks, is a public forum for First Amendment purposes." The court acknowledged a "general rule" that the Constitution does not apply to private conduct, citing *Hudgens v. NLRB,* 424 U.S. 507, 513 (1976). However, the court also noted that "[s]idewalks have traditionally been recognized as the quintessential public forum."

Further, the district court noted that "private property rights are very important and should not be disregarded simply because a private owner performs a function that is sometimes performed by the government." Even so, citing *Marsh v. Alabama,* 326 U.S. 501 (1946), the court declared that "if ever there was a case where the protections of the First Amendment to the United States Constitution should be applied to private property used for a particular public function, this is the case." The court noted that city sidewalks that run parallel to public streets and which allow members of the public to move around the city have traditionally been exclusively owned and maintained by the Government. Therefore, according to the court, by owning and maintaining the sidewalk in question, the Venetian was performing a public function.

In its holding, the court concluded that while the sidewalk in question is the Venetian's private property, as a "thoroughfare"

site because the Respondent had declined to enter into a "neutrality agreement" with the Union providing for a "card check" to determine whether a majority of the employees of the hotel-casino desired union representation. However, it should be noted that at the time of the events in question, apparently the only employees of the Respondent working on the construction site were managers and security personnel.

[9] The Respondent had a significant portion of the demonstration videotaped. Introduced into evidence as Jt. Exh. 5 was an approximately 30-minute long tape of certain portions of the demonstration. Introduced as R. Exh. 5 was a shorter version, approximately 7 minutes long.

along a public street, it "serves the needs of the general public." As the sidewalk serves what is basically a public function, "the Venetian does not have the right to exclude individuals from the sidewalk based upon permissible exercises of their right to expression under the First Amendment." Further, the court held that "[t]he public may use the Venetian's sidewalk for First Amendment purposes to the same degree that it may use any other public sidewalk subject to content neutral and reasonable time, place, and manner restrictions." As a result, the court denied the Venetian's motion for temporary restraining order and preliminary injunction. In related matters, the court granted the Union's expedited motion for summary judgment, and also entered judgment dismissing the Venetian's claims against the Union, Clark County,[10] and the Las Vegas Metropolitan Police Department. Finally, the court entered judgment on behalf of the American Civil Liberties Union of Nevada (ACLU), intervenor, granting its claim for a declaratory judgment that the sidewalk on the Venetian's property abutting Las Vegas Boulevard "is a public forum." (Jt. Exh. 2, apps. B, C, and D.)

While this matter was pending in district court, the Respondent completed construction of its hotel-casino. According to the testimony of David Friedman, the competed facility contains a large plaza area extending from the hotel frontage to Las Vegas Boulevard, with the private sidewalk, as set forth in the 1999 Agreement with the NDOT, constituting the border of the plaza adjacent to the street. The entire plaza area, including the sidewalk in question, is composed of distinctively colored and patterned tiles. It is these tiles that visibly differentiate the sidewalk in front of the Respondent's facility from the adjoining public sidewalks on either side of the Respondent's property. (Also, see R. Exh. 4.)

On appeal from the District Court, a panel of the Ninth Circuit affirmed.[11] See *Venetian Casino Resort v. Local Joint Executive Board,* 257 F.3d 937 (9th Cir. 2001), rehearing and rehearing en banc denied. The court framed the issue before it as "whether the sidewalk on private property that requires unobstructed pedestrian traffic is a public forum." The court noted that the Venetian's sidewalk was a "thoroughfare sidewalk, seamlessly connected to public sidewalks on either end and intended for general public use." Citing *Frisby v. Schultz,* 487 U.S. 474, 480 (1988), the court indicated that historically public streets and sidewalks have been used for public assembly and debate. They constituted the "archetype of a traditional public forum." (Internal quotation marks omitted.) Noting it was uncontested that the public sidewalk, which previously existed in front of the Venetian, was a public forum, the court concluded that while title to the property upon which the replacement sidewalk stood was held by the Venetian, the agreement with the NDOT had created "a servitude imposed for unobstructed public use of the sidewalk." Therefore, according to the court, "for purposes of public use it was a public sidewalk with the normal attributes of a public sidewalk."

The Circuit Court found that the sidewalk in question "is the only means for pedestrians to travel north or south along the Venetian's side of Las Vegas Boulevard, a busy multi-lane traffic artery." Apparently, the court did not view the difference in paving material between the Venetian sidewalk and adjoining sidewalks as significant, since it found "little to distinguish" the sidewalks from each other. Also, the court did not seem impressed with the Respondent's argument that the particular parcel of land used for the sidewalk in question had never been a public sidewalk or forum, finding that what is significant "is the historical use of the sidewalk adjacent to Las Vegas Boulevard . . . not the piece of land on which the replacement sidewalk had to be located." It was, therefore, significant to the court that the sidewalk in front of the Venetian's predecessor was publicly owned and "historically ha[d] been a public forum."

According to the Circuit Court, pedestrians walking up and down the Las Vegas Strip would have no way to determine that the sidewalk in front of the Venetian "enjoys a different legal status than the public sidewalks to which it is seamlessly connected to the north and south." In these circumstances, members of the public had the right to pass across the Venetian property along Las Vegas Boulevard and "to express themselves as they do so with the same freedom as on any public sidewalk."

The court rejected the Venetian's argument that it had not dedicated the sidewalk in question to public use, nor conveyed any property interest to the county or State. Reviewing the 1999 agreement between the Venetian and the NDOT, the court concluded that its "provisions constituted a dedication of the sidewalk to public use." The provisions of the agreement require the Venetian "to provide a sidewalk for general public use, and they deprive the Venetian of its private property right to block or otherwise impede public access to the sidewalk." In the view of the court, the agreement resulted in the State possessing a property interest in the sidewalk, the purpose of which was "to guarantee unrestricted public passage along Las Vegas Boulevard." On the other hand, "the Venetian retains a property interest other than that dedicated to the public" by the agreement.

The court emphasized that the sidewalk in front of the Venetian possesses "all the attributes of a public forum." In view of the historical public character of the predecessor sidewalk, the replacement sidewalk's current public use, its interconnection with the network of public sidewalks, and its dedication to public use, the court concluded that the sidewalk in question "constitutes a public forum subject to the protections of the First Amendment." Accordingly, the Court of Appeals affirmed the judgment of the District Court.

Thereafter, the Respondent filed a petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit. The U.S. Supreme Court denied that petition. *Venetian Casino Resort v. Local Joint Executive Board,* mem. 535 U.S. 905 (2002).

C. Argument and Analysis

1. The Venetian's sidewalk is a public forum

In his posthearing brief, counsel for the Respondent continues to argue that the sidewalk in the front of the Respondent's

[10] Stewart L. Bell, Clark County District Attorney, was also a named defendant against whom the Venetian's claim was dismissed.

[11] One judge dissented from the two-judge majority opinion.

facility is "private property" and, therefore, it was within the Respondent's property right to exclude the union demonstrators from the sidewalk. Of course, counsel acknowledges the decisions of the District Court and Ninth Circuit, but "respectfully submits that those decisions were in error and should not be followed." While the Respondent has certainly remained consistent in its position, there is no longer any doubt that this issue has now been decided. Although their analysis was somewhat different, both the District Court and Ninth Circuit held that the sidewalk in question was a "public forum" for purposes of First Amendment expressive activity. This issue having been conclusively decided by the Federal courts, no useful purpose will be served by discussing it further.

2. The union demonstrators were engaged in protected activity

It is the position of the Respondent that the activities of the union demonstrators on March 1 "fell outside the scope of Section 7," and, thus, were not protected so as to prohibit employer interference, restraint, or coercion under Section 8(a)(1) of the Act. The Respondent argues that the subject matter of the demonstration did not fall within the scope of activities typically covered by Section 7. The Respondent contends that the stated purpose of the demonstration was to "take back the sidewalk," which was unrelated to traditional union activity. Further, it is the position of the Respondent that at the time of the demonstration the Venetian had no employees the Union was interesting in representing, the Union's action could not have been related to the Respondent's labor practices, employment standards, or otherwise related to employee interests.

The facts do not support the Respondent's contention. As noted earlier, Glen Arnodo, union political director, testified that the reason the Union was picketing the Venetian was because the Respondent had not agreed to a "neutrality agreement," which would provide for a card check of majority status prior to the opening of the facility. While David Friedman, assistant to the chairman of the Venetian, testified that no neutrality proposal was ever made directly to him by the Union, he acknowledged that he "had heard" about the Union seeking such an agreement with the Venetian prior to the opening of the hotel-casino. Certainly, picketing the facility in an effort to obtain a "neutrality agreement" from the Employer would constitute union activity in the most basic sense. The fact that the Venetian had at the time of the picketing no employees the Union was interested in representing is really not relevant, as it was obvious that the hotel-casino was within several months of opening, at which time it would be filled with the type of employees that the Union had traditionally represented.

Further, the actions of the demonstrators on March 1 establish beyond any doubt that they believed the Union had a "labor dispute" with the Respondent, and wanted others, including potential employees and the general public, to be aware of the nature of that dispute. The videotapes of the demonstration establish conclusively that the union demonstrators intended principally[12] for prospective employees of the Venetian and the general public to know they had a labor dispute with the Respondent. The demonstrators carried picket signs, a tradition symbol of worker protest, with the words "Union Rights" on the signs, as well as other slogans. Their chants included the repetitive use of the words "Union" and "Union sidewalk," and the refrains of "Venetian no, Union yes" and "Hey, hey, ho, ho, Union bustings got to go." Also, speakers at the demonstration who addressed their comments to assembled groups of people spoke about operating the hotel-casino "one hundred percent Union," and being able to apply for jobs at the facility, which the speaker indicated should be operated "Union." (R. Exh. 5 and Jt. Exh. 5.)

The message being addressed to prospective employees by the union demonstrators was obvious, that being that the facility should be operated under a union contract and, that if hired by the Respondent, these new employees should become union members and support the Union. It is axiomatic that such an effort on the part of the demonstrators constituted the most basic form of union activity under Section 7 of the Act, as "concerted activities for the purpose of . . . mutual aid or protection." Having been unsuccessful at arranging for a card check of majority status through a "neutrality agreement," the Union obviously decided to take its "labor dispute" directly to prospective employees and to the general public.

Regarding its appeal to the general public, the intent was clearly to educate them as to the nature of the Union's dispute with the Respondent. Of course, the implied threat to the Respondent was that if the public was in sympathy with the Union in its labor dispute with the Respondent, members of the public might not be willing to patronize the Respondent's hotel-casino. In this respect, the Union's actions were analogous to "area standards" activity.

In *Great American,* 322 NLRB 17 (1996), the Board reiterated that area standards and customer boycott handbilling are normally protected by Section 7 of the Act. The Board indicated that it "normally does not look beyond the communication the union is conveying to consumers." Further, the Board held that the burden is on the employer "to establish if it can, that the union's activity is not what it appears to be and that it is outside the sphere of Section 7 protection." In the matter before me, the union demonstrators' message to the public was clear, namely that there was a labor dispute with the Venetian. That message was conveyed to the public through the Union's use of picket signs, chants, and speeches, which mentioned "union rights," operating the hotel-casino "one hundred percent union," and accused the Venetian of "union busting." While the dispute over the sidewalk was also prominently displayed by signs and slogans, I believe that the central message, which members of the public received from the demonstration, was that there was a "labor dispute" between the Union and the Venetian. I am of the view that the Respondent has failed to

[12] The union demonstrators also intended to publicize the Respondent's alleged improper attempt to control the sidewalk in front of the facility. The demonstration was characterized in part as an effort to "take back the sidewalk," and similar picket signs, slogans, and chants were used at the rally. Certainly, this characterization attracted a wider audience, including the ACLU. However, this does not detract from what was the Union's principal intent in organizing the demonstration. In my view, that was certainly the Union's interest in advertising its labor dispute with the Respondent.

establish that the union demonstrators were not involved in a labor dispute. Accordingly, I conclude that the actions of the demonstrators on March 1 constituted protected activity under Section 7 of the Act. Also see *Bristol Farms,* 311 NLRB 437 (1993).

3. The Union had the right to rally on the Venetian's sidewalk

As I have mentioned above, in his posthearing brief, counsel for the Respondent seems inclined to attempt to relitigate the issue of the nature of the sidewalk in front of the facility. However, as I indicated earlier, this issue has been definitively decided by the Federal courts. The sidewalk in question, although the private property of the Respondent, is a "public forum" for purposes of First Amendment expressive activity. The union demonstrators were engaged in just that type of expressive activity when they gathered on March 1 for the purpose of communicating to prospective employees and the general public the nature of their labor dispute with the Venetian. It seems obvious to me that the most logical place for the Union to have conducted the demonstration was on the temporary construction walkway, which was situated along the front of the Venetian's property at approximately the same location as the permanent sidewalk would ultimately exist. This, of course, was the area nearest the front of the hotel-casino, which would be the most reasonable place for the demonstrators to hold their rally. From this point there would be no confusion in the minds of prospective employees and the general public, the intended audience, that the Union's labor dispute was with the Venetian. As a "public forum," the sidewalk in question was the place where the union demonstrators could legally gather and engage in protected union activity under Section 7 of the Act. That is precisely what they did.

4. The Respondent's actions constituted a violation of the Act

In its answer to the complaint, the Respondent admits that on March 1 its agents, the security guards, summoned the Las Vegas Metropolitan Police and requested that the demonstrators be issued citations and excluded from the sidewalk in front of its facility. Further, the Respondent admits and the evidence establishes that the Respondent caused the recording of a trespass message and the repeated playing of that message over a loudspeaker during the demonstration. The Respondent also admits that its agents informed Union Business Agent Glen Arnodo on March 1 that he was being placed under citizen's arrest, and the following day its agents contacted the Las Vegas Metropolitan Police to make a report of the incident. The Respondent acknowledges that it took these actions as a direct response to the Union's demonstration on its private sidewalk, which the Respondent viewed as trespassing. According to the Respondent, these actions were "pre-litigation" activities, which the Respondent alleges constituted "constitutionally protected petitioning," or were at least incidental to and intertwined with such petitioning. Of course, the General Counsel contends that these actions constituted a violation of Section 8(a)(1) of the Act.

In *Bristol Farms,* supra*,* the Board stated, "It is beyond question that an employer's exclusion of union representatives from public property violates Section 8(a)(1) so long as the union representatives are engaged in activity protected by Section 7 of the Act. See, e.g., *Gainesville Mfg. Co.,* 271 NLRB 1186 (1984)." The Board went on to say that:

> Further, an employer's exclusion of union representatives from private property as to which the employer lacks a property right entitling it to exclude individuals likewise violates Section 8(a)(1), assuming the union representatives are engaged in Section 7 activities. See *Polly Drummond Thriftway,* 292 NLRB 331 (1989), enfd. mem. 882 F.2d 512 (3d Cir. 1989); *Barkus Bakery,* 282 NLRB 351 (1986), enfd. mem. sub nom. *NLRB v. Caress Bake Shop,* 833 F.2d 306 (3d Cir. 1987).

As I concluded earlier, the union demonstrators were engaged in activity protected by Section 7 of the Act when they participated in the rally conducted on the Respondent's sidewalk on March 1. The Federal courts having decided that the sidewalk in question is a "public forum" for the purpose of First Amendment expressive activity, the union demonstrators had a constitutional right to conduct their rally on the sidewalk. Therefore, regardless of whether the sidewalk was for purposes of the demonstration considered "public property" or "private property" upon which the Respondent lacked a property right entitling it to exclude the demonstrators, the result would be the same. The actions of the Respondent in attempting to have the union demonstrators removed from the sidewalk, as alleged in the complaint, violated Section 8(a)(1) of the Act. *Bristol Farms*, supra*.* The Respondent's contention that it was simply attempting to protect its private property from trespassers is of no avail. According to the Federal courts, while the Respondent retains the sidewalk as its private property, it has lost the right to have the demonstrators removed from what has become a "public forum" for the purpose of expressive activity. In other words, the Respondent lacks a property right entitling it to exclude the union demonstrators, who were engaged in protected Section 7 activity. Without the requisite property interest, the Respondent's actions in attempting to remove the union demonstrators violated the Act under existing Board law. See *Indio Grocery Outlet,* 323 NLRB 1138 (1997).

Despite the adverse holdings by the Federal courts in the sidewalk case litigation, the Respondent argues that its actions in attempting to have the union demonstrators removed from the sidewalk cannot be a violation of the Act as they constituted "pre-litigation" activities, which were incidental to and inextricably intertwined with the litigation. The Respondent relies heavily upon the Supreme Court's decision in *BE&K Construction Co. v. NLRB,* 536 U.S. 516 (2002). It is counsel for the Respondent's position, as set forth in his posthearing brief, that under the holding of that case an employer's lawsuit must be both objectively baseless and subjectively brought for an unlawful motive in order for the lawsuit to constitute a violation of the Act. Counsel believes that it is significant that in the present complaint the General Counsel has failed to allege the Respondent's filing of the Federal litigation as a violation of the Act. Allegedly, this is because the General Counsel must know he could not prevail under the Supreme Court's decision

in *BE&K Construction Co.* Counsel for the Respondent argues that in an earlier complaint the General Counsel alleged such a violation, however, following the Supreme Court's decision, the present complaint contained no such allegation.

It is not the proper role of an administrative law judge to speculate as to why certain matters are not alleged in a complaint. Alleging violations of the Act come within the exclusive province of the Regional Director and the General Counsel. As the complaint before me contains no such allegation, I need not consider the question of whether the Respondent's lawsuit was a violation of the Act, or not. However, counsel for the Respondent attempts to expand on the Supreme Court's decision in *BE&K Construction Co.*, arguing that it should include "pre-litigation" activities that are incidental to and intertwined with the actual filing of the lawsuit. Counsel does not cite any labor related cases for such a proposition, but does attempt to draw an analogy with the Supreme Court's holdings in antitrust cases.

According to the Respondent, in order to safeguard its constitutionally protected right to petition the Government through its Federal court litigation on the sidewalk issue, it had to engage in certain prelitigation activities. It is argued that if the Respondent failed to do so, it would effectively waive its right to sue. Among these prelitigation activities were the following: (1) summoning the police and asking them to issue citations to demonstrators and eject them from its sidewalk; (2) recording the trespass message and repeatedly playing it to the demonstrators over the public address system; and (3) informing Glen Arnodo that he was under citizen's arrest and contacting the police to make a report of the incident. Counsel for the Respondent argues that these actions were all protected as direct petitioning of governmental entities and/or inextricably intertwined with such petitioning so as to be constitutionally protected. According to counsel, without being able to take this action, the right to sue would essentially become meaningless as the Respondent would not be able to satisfy the "necessary prerequisite to establishing the need for injunctive relief and to avoid being found to have waived" the right to sue.

Assuming, for the sake of argument, that counsel's theory has some validity, this case would require the balancing of the Employer's right to engage in "pre-litigation activity" in defense of its property rights versus the rights guaranteed employees under the Act. In the facts of this case, I believe that employee rights under the Act should prevail. Those rights include some of the most basic sought to be protected by the Act, namely the right of the demonstrators to appeal to prospective employees that they should support the Union, and to appeal to the general public that they should not patronize the Venetian because it had a labor dispute with the Union. Both prospective employees and the general public had a corresponding right to receive this message. Despite the Respondent's denials, I believe that it was clear to all concerned at the time that a genuine "labor dispute" existed, that being the refusal of the Respondent to enter into a "neutrality agreement" with the Union. Under these circumstances, the Union's demonstration was certainly a manifestation of "union activity" in its most basic form.

In any event, however, I do not believe that a balancing test is appropriate in this case, as the Respondent has already been found by the Federal courts to lack the requisite property interest in the sidewalk as would allow it to exclude the union demonstrators. Without such a property interest, there is no "right" of the Respondent to balance against the obvious Section 7 rights of the demonstrators. See *Victory Markets,* supra*; Bristol Farms,* supra.

Further, I am of the opinion that if the Respondent were permitted to have the union demonstrators removed from the sidewalk, which sidewalk was found by the courts to constitute a "public forum," it would have had a profoundly chilling effect on the demonstrators' Section 7 rights.[13] On the other hand, I am not convinced that the Respondent would have been at all foreclosed from exercising its right to petition the courts through a lawsuit without first interfering with the rights of the union demonstrators to participate in the rally on the Respondent's sidewalk. Under the facts of this case, I do not believe that the holding in *BE&K Construction Co*., supra, is applicable.

The Respondent argues that it actions were reasonable and not unlawfully motivated and, thus, not a violation of the Act. According to the Respondent, its actions were taken as a good faith effort to protect its property rights, and not in an effort to harm the Union or to deprive employees of their rights under the Act. The Respondent contends that under the Nevada State trespass statute,[14] which it cited to the demonstrators at the rally, it believed at the time of the demonstration that the demonstrators were in violation of the law. Additionally, the Respondent alleges that at the time of the demonstration it was aware of an earlier lawsuit in the "*MGM Grand* case," which counsel for the Respondent contends raised virtually identical questions regarding a hotel-casino's fight to exclude nonemployee demonstrators from its privately-owned sidewalk, which was allegedly resolved favorably to the *MGM Grand*. (R. Exh. 2.)[15]

Further, the Respondent argues that there is no evidence in the record to suggest that the actions of the Respondent in attempting to have the demonstrators removed from its sidewalk were a "sham" intended to mask an unlawful motive. Counsel for the Respondent contends that the Respondent took the actions it did, which actions were precedent to filing the lawsuit, because it reasonably believed, based on the Nevada trespass statute and the

[13] The Board case law makes it clear that it is the demonstrators' Sec. 7 rights that are violated by the Respondent's unlawful action. See *Bristol Farms, Inc*., supra*; Gainesville Mfg. Co.,* supra.

[14] Nevada Revised Statutes Section 614.160, Picketing. (R. Exh. 3.)

[15] I admitted into evidence, over counsel for the General Counsel's objection, a document from the *MGM Grand* case entitled stipulation for judgment of dismissal with prejudice and findings of fact and conclusion of law. I admitted the document because I was of the opinion, and continue to believe, that it is "marginally" relevant since it is part of the Respondent's defense that its actions against the demonstrators were taken in good faith. However, because of my ultimate conclusion regarding the Respondent's "motive" defense, it is unnecessary for me to closely analyze the document in question. Further, I would add that no two lawsuits involving different plaintiffs are ever identical, and my admission of the document into evidence should not be construed as my agreement with counsel for the Respondent's contention that the *MGM Grand* case raised "virtually identical questions" regarding a privately owned sidewalk, as in the Venetian case.

MGM Grand case, that its private property claim was valid and its actions were necessary to protect its property rights. The Respondent argues that there is no evidence of "ill will" on its part.

While the Respondent may well have acted in "good faith" in this matter, its motives are not dispositive of the issue of whether its actions violated the Act. It is well established that in an 8(a)(1) case it is unnecessary to prove that an employer acted in bad faith or with improper motives. In *NLRB v. Burnup & Sims, Inc.,* 379 U.S. 21 (1964), the Supreme Court reversed the court of appeals, which had refused to reinstate two discharged employees because it concluded the employer had acted in good faith in discharging them. The Supreme Court disagreed, finding that the employer had violated Section 8(a)(1) of the Act, regardless of its motive.

In reiterating its long-held position, the Board stated in *Phoenix Newspapers,* 294 NLRB 47, 50 fn. 19 (1989), that, "we note that in many cases involving employer sanctions against arguably protected activity . . . the employers raise sincere and quite tenable grounds for the argument that their actions were not motivated by the mere fact that employees were engaged in protected activities but rather were induced by alarm at the injurious effects of the protected activity. The Board did not take issue with the employers asserted motives but nonetheless found the alleged violations." Further, it is significant to note that neither *Indio Grocery*, supra, nor *Bristol Farms*, supra, contains any findings by the Board that the respective employers did not honestly believe in their asserted property rights.

Under the facts of this case, it is simply not pertinent whether the Respondent had a good-faith belief that its property right claim was meritorious. As decided by the Federal courts, the Respondent did not have a property interest in the sidewalk sufficient to overcome the right of the union demonstrators to engage in expressive activity on the sidewalk, which had acquired the attributes of a "public forum." While the Respondent may very well have had a genuine good-faith belief in the legal correctness of its position, it acted at its own peril when it sought to remove the demonstrators from the sidewalk in question. Its actions had a chilling effect on the Section 7 rights of the demonstrators/employees to engage in union activity. The Respondent should not be able to violate the Act, merely because it desires to test a legal principle. As I noted, I do not view the Respondent's actions in attempting to have the demonstrators removed from the sidewalk as incidental to and inextricably intertwined with its lawsuit. I am not convinced that the Respondent would have been foreclosed from a lawsuit to settle the issue of whether the sidewalk was a "public forum," without first taking the actions it did to have the demonstrators removed. Good-faith motive or not, those actions violated the Act.

D. Summary

Based on the above, I conclude that the Respondent's conduct as described in paragraphs 5(b)(1), (2), and (3) of the complaint interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act. As such, the Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Venetian Casino Resort, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

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

(b) Causing the recording of a trespass message and the playing of the message over a loudspeaker directed to demonstrators on behalf of the Union, who were engaged in a peaceful demonstration on the sidewalk in front of the Respondent's facility.

(c) Informing Union Business Agent Glen Arnodo, who was engaged in a peaceful demonstration on behalf of the Union on the sidewalk in front of the Respondent's facility, that he was being placed under citizen's arrest, and the following day contacting the Las Vegas Metropolitan Police to make a report of the incident.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

1. The Respondent, Venetian Casino Resort, LLC, its officers, agents, successors, and assigns, shall cease and desist from

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

(b) Causing the recording of a trespass message and the playing of the message over a loudspeaker directed to demonstrators on behalf of the Union, who are engaged in a peaceful demonstration on the sidewalk in front of the Respondent's facility.

(c) Informing Union Business Agent Glen Arnodo, or any other demonstrator on behalf of the Union, who is engaging in a peaceful demonstration on the sidewalk in front of the Respondent's facility, that he is being placed under citizen's arrest, and contacting the Las Vegas Metropolitan Police to make a report of the incident.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

2. The Respondent, Venetian Casino Resort, LLC, its officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its casino-hotel in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 1999.

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

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