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When Calling The Police Is Permissible Under Labor Law

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Nelson Cary, a partner in the Vorys Columbus office, and George Stevens, an associate in the Columbus office, co-authored an article for *Employment Law360* titled "When Calling The Police Is Permissible Under Labor Law." The article highlighted the D.C. Circuit's decision in *Venetian Casino Resort LLC v. NLRB*. According to the authors, the decision demonstrates that a person or entity may petition the government without fear of liability to either legislate or act to protect the petitioner's interests in the labor-relations context. The full text of the article is included below.

When Calling The Police Is Permissible Under Labor Law

The D.C. Circuit recently held that the First Amendment protects conduct that would otherwise be unlawful under the National Labor Relations Act, but only to a point.

Facts

The case involved Venetian Casino Resort LLC in Las Vegas. The Venetian was built in 1999. At some point in the project it became clear that, to accommodate the extra traffic it would bring, the road in front of the casino would need another lane. The subsequent widening replaced a public sidewalk, which the Venetian agreed to rebuild on its own property. In the interim, it erected a temporary, public walkway, which was also located on the Venetian's property.

The installation of this temporary, public walkway coincided with the Venetian's problems with two labor unions coming to a head. The unions obtained permits from the Nevada Department of Transportation to hold demonstrations outside the Venetian on the temporary public walkway. The Venetian, fearing the impact this could have on its business and public relations, objected to the county district attorney's office and to the police that the walkway was private property. Neither agreed, and the demonstrations went ahead after the district attorney's office indicated it would not prosecute, and the

police indicated they would not arrest, demonstrators for trespass.

Nonetheless, the Venetian sought to discourage the protests, in which over 1,000 individuals participated, using several measures. It marked its property lines in bright orange paint and posted signs along the walkway warning demonstrators that they were on private property. It blasted warnings to the demonstrators over loudspeakers that they were trespassing. Their security personnel even placed the individual leading the demonstration under “citizen’s arrest.” Finally, the Venetian asked the local police to arrest demonstrators for trespassing.

Litigation

Unsurprisingly, litigation followed the demonstration. The Venetian filed for injunctive and declaratory relief against the unions and the city, seeking to prevent future demonstrations. This backfired, as the Ninth Circuit held that the walkway was public — not private — property, that the demonstrations were protected by the First Amendment and that the Venetian had no right to prevent public access to the temporary walkway.

At the same time as the Venetian pursued its litigation, the unions filed an unfair labor practice charge against the Venetian for: (1) broadcasting the loudspeaker message; (2) the citizen’s arrest of the demonstration’s leader; and (3) asking local police to arrest demonstrators for trespass. The administrative law judge hearing the case agreed with the unions that the Venetian’s measures violated Section 8(a)(1) of the NLRA, and the National Labor Relations Board affirmed that decision in 2005.

The Venetian appealed to the D.C. Circuit. The court first agreed with the NLRB that the loudspeaker broadcast and the citizen’s arrest were unlawful. The court returned to the NLRB, however, the allegation concerning the request to police to arrest the demonstrators. The court believed that the NLRB had not considered a crucial angle: whether the request was a protected petition under the First Amendment. On remand, the NLRB decided that it was not; the Venetian appealed again, and this time the D.C. Circuit, through Judge Brett M. Kavanaugh, sided with the casino and held that the Noerr-Pennington doctrine covered the request.

Noerr-Pennington Doctrine

The Noerr-Pennington doctrine is rooted in antitrust law, and immunizes private entities from liability for attempts to influence the passage or enforcement of antitrust laws, even if those laws would have anti-competitive effects. This is premised on the right to free speech under the First Amendment: No matter the potential anti-competitive consequences of what is being advocated, persons and entities are free to advocate for their interests. As long as the petition is made in good faith, it is protected.

But what if the petition is not in good faith? Where the petitioning process is used simply as an anti-competitive tool without legitimately seeking a positive outcome, the petitioning entity loses its immunity. This is called the “sham proceedings” exception.

Courts have expanded the Noerr-Pennington doctrine outside of the antitrust arena over the years, including, as Judge Kavanaugh noted, into the labor-relations context. “Employer conduct that would otherwise be illegal may be ‘protected by the First Amendment when it is part of a direct petition to the

Government.”

Applied to Venetian

The court first considered whether the Venetian’s request that local law enforcement arrest the demonstrators was a petition within the meaning of the doctrine. Noting that “a petition ‘conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns,’” the court held that a request for police to take action to address trespasses on the petitioner’s property fit squarely within the definition of a Noerr-Pennington petition. Further, requests to police in general fit squarely within the requirement that the petition be one to the government for the enforcement of laws.

The NLRB argued that the doctrine only applied to high-level policy lobbying and that reports of legal violations did not constitute petitions to the government. The NLRB relied on two cases, which held that collusion among private entities is not protected and that a private entity’s petitioning for the enforcement of others’ rights is not protected.

The court found both to be inapplicable to the Venetian’s case. The Venetian was asking the police — not another private entity — to enforce the Venetian’s — not someone else’s — property right. Such an act is immune under the doctrine. Thus, the casino’s request for the police to arrest alleged trespassers at the demonstration was protected by the First Amendment and was not a violation of Section 8(a)(1) of the NLRA.

Unless, of course, the petition was not made in good faith: The court found that the NLRB, in rejecting the applicability of the Noerr-Pennington doctrine outright, had failed to consider the possibility that the petition, while covered, was a sham. It remanded the case (again) to the NLRB to consider that issue.

Conclusion

Venetian Casino Resort LLC v. NLRB demonstrates, once again, that a person or entity may petition the government without fear of liability to either legislate or act to protect the petitioner’s interests in the labor-relations context. There are, however, several wrinkles to this generalization, especially as the NLRB’s decision over the sham exception — and any subsequent appeal — unfolds.

First, it is unclear what effect, if any, the Venetian’s initial requests to the district attorney’s office and the police prior to the demonstration will have on the sham exception analysis. Surely those two requests qualify as petitions under the Noerr-Pennington doctrine; will repeating a request known to have previously fallen on deaf ears support a conclusion that the petition was a sham? What about the court ruling that the walkway was public?

Second, these are unusual facts. This situation would likely never have come about if the demonstration had occurred at a different time and place, rather than on a temporary walkway arguably on private property.

Finally, in addition to being unusual, these are narrow facts: the Venetian was petitioning a unit of government for the enforcement of a law pertaining to its property interest. As Judge Kavanaugh explicitly acknowledged, the enforcement of someone else's right is not covered by the Noerr-Pennington doctrine. For example, the U.S. Supreme Court has held that an employer's call to the U.S. Immigration and Naturalization Service to report on its employees' immigration status during a labor dispute is not a protected petition. The employer has no interest in the enforcement of federal immigration laws. This potentially fine distinction suggests caution. Before following the Venetian's example, therefore, an employer should carefully consider its circumstances.