Case Nos. 28-CA-14519 and 28-CA-15148

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NEW YORK NEW YORK, LLC
d/b/a NEW YORK NEW YORK HOTEL AND CASINO
Respondent

and

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS,
CULINARY WORKERS UNION, LOCAL 226
and BARTENDERS UNION, LOCAL 165
Charging Party

On Remand from the U.S. Court of Appeals for the D.C. Circuit

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POSITION STATEMENT OF CHARGING PARTY LOCAL JOINT EXECUTIVE BOARD, CULINARY WORKERS UNION LOCAL 226 and BARTENDERS UNION LOCAL 165

Richard G. McCracken
McCRACKEN, STEMERMAN, BOWEN
& HOLSBERRY
1630 S. Commerce Street, A-1
Las Vegas, Nevada 89102
(702) 386-5107; (702) 386-9848 *(fax)*

Michael T. Anderson
DAVIS, COWELL & BOWE, LLP
1155 15th Street, N.W., Suite 405
Washington, D.C. 20005
(202) 223-2620
(202) 223-8651 *(fax)*

Attorneys for Charging Party Local Joint Executive Board,
Culinary Workers Union, Local 226 and Bartenders Union, Local 165

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MISCELLANEOUS

These cases come before the Board on remand from the D.C. Circuit in *New York New York Hotel & Casino v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2003). The facts are stated in the Board's initial decisions in 334 NLRB No. 87 (2001) and 334 NLRB No. 89 (2001). We adopt the factual discussion presented in the Board's original decisions.

SUMMARY OF ARGUMENT

In its remand order, the Court of Appeals asked the Board to answer the following questions about the Board's policy: 1) to what extent do Ark employees enjoy the rights recognized in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) in non-work areas around New York New York's hotel-casino? 2) Does it matter that Ark employees have returned to the hotel after their shift, instead of seeking access during break periods? 3) Does it matter whether Ark employees were communicating with customers rather than other employees? *New York New York Hotel*, 313 F.3d at 590.

The Board need not break new ground to answer the Court's questions. The Board need only explain the rationale for its existing policy at greater length to justify enforcement.

I. Contractor employees have the same § 7 rights as other workers.

New York New York Hotel & Casino ("the Hotel" or "NYNY") advances a proposition that has never been accepted by the Board or any court. It argues that the on-site employees of its food service contractor Ark have *no* NLRA rights enforceable against the Hotel, because these workers are not the Hotel's direct employees.

This theory would radically revise American labor law. The Ark restaurant workers here are not strangers to the Hotel. They work inside the Hotel, by the Hotel's invitation, as the employees of its chosen contractor. (Part I.A., below.) If such employees cannot enforce § 7 rights against the property owner, then the NLRA will become a two-tiered system with greatly diminished rights for employees who work on a third party's property. (Part I.B, below.)

This is not the law. Section 7 of the NLRA creates rights enforceable against third parties, not just the immediate employer. (Part I.C., below.) A property owner violates the NLRA if it bars its contractor's employees for wearing union insignia, or for union activism on the property. Unlike outside union organizers, such on-site contractor employees enjoy direct, non-derivative

§ 7 protection against the property owner. The owner has voluntarily invited the contractor employees onto its property; it may not then complain that these invited employees are "strangers" when they exercise the same § 7 rights as the owner's own workers.

Contractor employees' rights cannot be confined to the leasehold owned by their immediate employer, if any. (Part I.D. below.) Most service contractors have *no* property rights to the premises at all, like security services, janitorial services and temporary agencies. These employers typically have no leasehold or tenancy in the property – they only have a license to enter with their employees and perform services on the owner's property. Nor are most contractor employees confined to a separate niche "leased" to their employer. In this case, Ark employees work throughout the Hotel, carting supplies and delivering room service. Their off-duty time is also outside Ark's restaurant space – they use the NYNY employee cafeteria for their meal breaks. The working areas and break areas of workers like Ark's are not confined to some distinct enclave. Even where the contractor has some internal niche in the facility, its employees must have a § 7 right of access to the *external* non-work areas of the facility, like parking lots and entrances. This is what the Board has

consistently preserved for Section 7 activity under *Tri-County Medical Center*, 222 NLRB 1089 (1976).

II. Off-duty employees have the same *Tri-County* rights after their shifts as during break periods.

The Court's next question –whether off-duty employees enjoy the same rights *after* their shift as they do during break periods – is easily answered. This is well-established law under *Tri-County Medical Center*. (Part II below.) The Board, with court approval, has consistently held that off-duty employees may return to non-work areas like gates and entrances after their shift, with the same right of access as they enjoy during their break periods. The Board cannot create a two-tiered standard in *Tri-County* law to give contractor employees a arbitrarily diminished level of rights.

III. Employees enjoy the same protected right to communicate with third parties as they do with each other.

Settled Board policy also provides the answer to the Court's final question – whether Ark employees enjoy the same § 7 right to communicate with customers as they do to each other. After the D.C. Circuit's remand order in this case, the D.C. Circuit itself answered this question in *Stanford Hospital and Clinics v. NLRB*, 325 F.3d 334, 342-345 (D.C. Cir. 2003). Once off-duty employees are rightfully on the property, the owner's interest becomes purely

managerial. This managerial interest does not vary with the content of the employees' leaflets. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 572 (1978). It would greatly *increase* the intrusion to require passersby to identify themselves as a condition of receiving a leaflet. The simple offering of a leaflet, even to customers, does not threaten the employer's managerial interests. *Stanford Hospital*, 325 F.3d at 343-344.

ARGUMENT

I. CONTRACTOR EMPLOYEES HAVE THE SAME § 7 RIGHTS AS A PROPERTY OWNER'S OWN EMPLOYEES.

A. This Case Involves On-Site Employees.

New York New York argues that restaurant workers inside its complex have no NLRA rights against it, because they are employed by NYNY's contractor Ark, not by NYNY itself. The Hotel reasons that these workers have no greater right to engage in union activity on its property than outside union organizers, citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 110 (1956) and *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 534 (1992).

The Hotel's argument ignores that the restaurant workers here are *on-site* employees. They work "regularly and exclusively on the owner's property [and]

are rightfully on that property pursuant to the employment relationship . . . " 334 NLRB No. 87 at p. 1. They do not claim some vicarious right of access in the name of other workers where they are themselves strangers, as in *Babcock & Wilcox* and *Lechmere*. Their claim to solicit and distribute does not derive from that of other workers – they *are* workers employed inside the Hotel exercising their own non-derivative § 7 rights. *See Hillhaven Highland House*, 336 NLRB No. 62 (2001) at 3-4.

Nor are Ark employees confined to a discrete part of the Hotel property. Although they are based in its restaurants, Ark employees work and take their breaks outside Ark's restaurant space: they carry supplies through the "streets" of NYNY, Tr. 120-121 (Case No. 14519), they deliver room service to Hotel guests, Tr. 47 (Case No. 15148), and they use the NYNY employee cafeteria for meal breaks. GC Ex. 5, §6.3 (Case No. 14519).

The relationship between Ark and NYNY is likewise blurred. NYNY controls Ark's employee handbook policies, Tr. 50 (Case No. 14519). There are no indications to NYNY's guests that its restaurants are operated by a different entity. Tr. 35-36 (Case No. 15148). NYNY's revenues under its lease to Ark

depend on the extent of Ark's sales. Tr. 50-51 (Case No. 14519).[1]

B. The Hotel Advocates a Two-Tiered System of NLRA Rights in the Workplace.

The Hotel reasons that its property right is unaffected by any § 7 rights of Ark workers, and so it may forbid activity that would have been protected if it operated the restaurants with its own employees.

1. The Hotel's argument would make contractor employees second-class citizens under the NLRA.

If the Hotel's argument were accepted, the NLRA would become a two-tiered system, with sharply diminished rights for workers whose employer does not own their work site.

NYNY implicitly concedes that its *own* employees have the full protection of § 7 to leaflet, solicit, wear union buttons, and exercise all other workplace rights on the Hotel's property, under *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). According to NYNY, however, it may invite contractor employees to work on its property, but on condition that they refrain from § 7 activity.

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[1]At trial, the General Counsel urged in the alternative that Ark and New York New York constitute a single integrated enterprise, such that Ark's employees should be considered employees of NYNY directly. 334 NLRB No. 89 at p. 8 n.5. The ALJ did not find it necessary to decide this issue. *Id.* If the Board rejects the ALJ's primary holding, it must remand the issue to the ALJ for findings on the General Counsel's alternative theory.

2. The Hotel's approach would nullify § 7 rights for a significant part of the American workforce.

The Hotel's theory would have sweeping consequences for millions of American workers. The early 20th Century industrial model (in which a single business owned and operated the workplace) is changing in many sectors to a new structure where the owner brings in contractors, temporary agencies, or tenants to operate part of the overall enterprise. *See* Craig Becker, *Labor Law Outside the Employment Relation,* 74 Tex. L. Rev. 1527, 1528-1532 & ns. 12-25 (1996) (describing the rapid expansion of "outsourcing" in the American economy.) Contracting-out allows businesses to auction work to the lowest bidder, thereby imposing a constant downward pressure on subcontractor wages. *Burlington Northern R.R. Co. v. Teamsters Local 174*, 203 F.3d 703, 710 & n.8 (9th Cir. 2000) (*en banc*) (recognizing economic pressure of subcontracting against wages).

The Hotel's argument, if accepted, would add a direct legal disability for contractor employees. By changing roles from direct employer to contracting client, a business like NYNY could suppress on-site union activity that would have been protected if it directly employed the same workers.

This would have a far-reaching effect on American labor law. The case reports show how widespread on-site subcontracting has become:

- **Construction**

In the modern construction industry, the property owner, in conjunction with a general contractor, typically divides up the work on a given site among many specialized subcontractors. *See, e.g., Bldg. & Const. Trades v. Associated Builders & Contractors*, 507 U.S. 218, 223 (1993); *Bldg. & Const. Trades v. Allbaugh*, 295 F.3d 28, 30 (D.C. Cir. 2002); *Mohave Elec. Co-op. v. NLRB*, 206 F.3d 1183, 1186 (D.C. Cir. 2000). The Board has consistently defended the on-site § 7 rights of construction subcontractor employees against property owners and general contractors, despite the absence of a direct employment relationship. *Wolgast Corp.*, 334 NLRB No. 31 (2001) at 1; *CDK Contracting Co.*, 308 NLRB 1117, 1117-18 (1992). If the Hotel's theory is accepted, however, the Board will be overruling *Wolgast* and *CDK Contracting*. If this becomes the law, developers and general contractors will have an unrestricted right to stop union activity on their job sites.

- **Retail sales**

The stand-alone store owned and operated by a single retailer has been widely replaced by the multi-unit shopping mall, in which the mall owner leases most stores to other employers. This was the situation in both *Lechmere*, 502 U.S. at 529 and *Hudgens*, 424 U.S. at 509. *See also United Food & Commercial Workers Local 400 v. NLRB*, 222 F.3d 1030, 1034 (D.C. Cir. 2000) (retail store operated under lease with mall owner); *NLRB v. Calkins*, 187 F.3d 1080, 1083 (9th Cir. 1999) (same).

Under the Hotel's theory, not even the tenant store employees in *Lechmere* and *Hudgens* had *Republic Aviation* rights, because they were "non-employees" as to the mall owner. This is not what the Supreme Court contemplated in *Lechmere* in classifying outside union organizers as "non-employees." In distinguishing between the rights of "employees" under *Republic Aviation* and "non-employees" under *Babcock & Wilcox*, the *Lechmere* Court focused on the derivative nature of the union organizers' claim of access: the organizers were strangers to the property, and their only claim was vicariously based on the interests of on-site employees. 502 U.S. at 533. Employees of a tenant store do not such make a derivative claim of access; their right to communicate comes from their *own* connection to the property.

- **Janitorial services**

Cleaning and maintenance services are typically performed by outside contractors, like the one in *Southern Services*, 300 NLRB 1154 (1990) *enforced* 954 F.2d 700 (11th Cir. 1992). Such contractor employees work on property owned by their employer's client. For example, the janitor in *Southern Services* worked regularly and exclusively in Coca-Cola's headquarters, the place her contractor employer assigned her. 300 NLRB at 1154. *See also Service Employees International Union Local 525*, 329 NLRB 638, 638-644 (1999) (describing subcontracted janitorial labor market in Washington D.C.)

- **Food services**

The Hotel is not unusual in outsourcing its restaurant services. Workers employed by food service contractors are increasingly involved in organizing drives inside the client's facility, *see Metropolitan Opera Assn. v. Hotel Employees Local 100*, 239 F.3d 172, 177 (2d Cir. 2001) (vacating injunction against union leaflets holding Metropolitan Opera accountable for its restaurant contractor's labor practices) or the SeaFirst building in Seattle, *see Seattle-First Nat'l Bank v. NLRB*, 651 F.2d 1272, 1273-74 (9th Cir. 1980) (bank owning 50-story building must allow striking employees of a leased restaurant to picket in front of the 46th floor restaurant.)

- **Security**

Private security guards typically work on a client's property, not the property of their immediate employer. The high turnover of service contracts in this industry gave rise to the Supreme Court's decision in *NLRB v. Burns Int'l Security Services*, 406 U.S. 272, 274-275 (1972). In *Burns*, the Court held that the location of the employees' work (at the client Lockheed Aircraft) rather than the identity of their immediate employer (the contractors Wackenhut and Burns) was the pivotal consideration in whether the NLRA protected their continuing collective-bargaining rights. *Burns*, 406 U.S. at 274-279. The same consideration applies to employees' access rights.

- **Longshore and warehousing**

Stevedores normally work on piers and wharves owned by someone other than their immediate employer. While dock facilities are typically owned by port authorities or marine terminals, the longshore work is generally performed by subcontractors or tenants. *See e.g., Golden Stevedoring Co.*, 335 NLRB No. 37 (2001); *Toledo World Terminals*, 289 NLRB 670 (1988). The same pattern exists in warehouses serving land transport. *See, e.g., Sea-Jet Trucking Co.*, 327 NLRB 540 (1999).

- **Health care**

Even hospitals are increasingly subcontracting entire areas of patient care to outside firms. This change in the identity of the immediate employer often has a direct impact on employee organizing. *See, e.g., St. Vincent Medical Center*, 338 NLRB No. 130 (2003) (entire respiratory care unit inside hospital lawfully subcontracted during organizing campaign).

3. The Hotel's theory allows property owners to forbid *any* on-site union activity by subcontractor employees.

The Hotel's theory, if accepted, could not be confined to off-duty leafleting. NYNY's direct employees also enjoy *Republic Aviation* rights like the right to wear union insignia, *see Pioneer Hotel v. NLRB*, 182 F.3d 939, 946 (D.C. Cir. 1999) *enforcing* 324 NLRB 918, 921-923 (1997), the right not to be barred from the property for union activity, 29 U.S.C. §158(a)(3), as well as the right to solicit support in outside non-work areas. *Tri-County Medical Center, Inc.*, 222 NLRB 1089 (1976); *Lafayette Park Hotel*, 326 NLRB 824, 828-829 (1998) *enfd.* 203 F.3d 52 (D.C. Cir. 1999).

If the Hotel is right, it could forbid Ark employees from wearing union buttons in the Hotel, or from distributing leaflets in the employee cafeteria shared by Ark and NYNY employees, GC Ex. 5, § 6.3 (Case No. 14519). If

contractor employees have no greater status than outside union organizers, the Hotel would be within its rights to exclude union activists as freely as it bars outside union pickets.

C. The Hotel's Theory is Contrary to Established Board Policy.

1. Section 7 rights are enforceable generally, not just against the workers' individual employer.

The Hotel urges that § 7 rights are only enforceable against the immediate employer. This is not the law. The NLRA's definitional sections were expressly written to foreclose such an argument: this is why Congress defined the term "employee" to "include any employee, and *shall not be limited to the employees of a particular employer* . . ." 29 U.S.C. § 152(3) (emphasis added). The Supreme Court and the Board have long recognized that a business that invites a contractor on its property is an "employer" within the meaning of the NLRA, 29 U.S.C. § 152(2), and that such an employer may violate the Act with respect to the contractor's employees. *Hudgens v. NLRB*, 424 U.S. 507, 510 n.3 (1976).

Section 7 establishes generally enforceable rights, which may be vindicated even against local governments. *Livadas v. Bradshaw*, 512 U.S. 107, 133-134 (1994) (union member could vindicate her § 7 rights against state

agency.) If the Nevada legislature were to define *Republic Aviation* leafleting as actionable trespass, that statute would be preempted by the NLRA, as a direct interference with § 7 rights defined by the Board. *Livadas*, 512 U.S. at 119 n.13 (where state trespass law deprives parties of NLRA-protected rights, the state policy is preempted.)

The Hotel is wrong to suggest that state property law trumps the NLRA. Under the federal Supremacy Clause, U.S. Const. Art. VI, rights defined under a federal statute supersede any conflicting state common-law property rights. While the NLRA does not create derivative rights for nonemployee outsiders, *Lechmere*, 502 U.S. at 522, it *does* create rights for on-site employees, as in *Republic Aviation*, that supersede the state-law rights of the workplace's owner. This is the entire premise of *Republic Aviation* – that the owner's property right to condition access to its property must yield to workers' NLRA rights to leaflet and solicit on property during non-working time. 324 U.S. at 798.

The law has consistently required an owner inviting contractors onto its property to respect the § 7 rights of their employees:

- **Union buttons**

When a property owner invites a contractor to its property, the owner may not forbid the contractor's employees from wearing union insignia. *Fabric*

Services, 190 NLRB 540, 541-542 (1971).

In *Fabric Services*, an anti-union textile mill in South Carolina needed repairs to its telephone system. Southern Bell dispatched a repairman, who was an open supporter of the Communications Workers Union. 190 NLRB at 541. When he arrived at the textile mill, the mill owner asserted a property right to forbid him entry because he wore a pocket protector displaying union insignia. 190 NLRB at 541. The mill owner told the Southern Bell repairman to take the insignia off, and instructed Southern Bell to make the same demand. The Board found that both the textile mill and Southern Bell violated the repairman's *Republic Aviation* rights to wear union insignia. 190 NLRB at 542. Although the textile mill was not the repairman's immediate employer, the Board held that the mill had an obligation to honor his § 7 workplace rights, which superseded any property right it had to exclude him. *Id. See also Control Services*, 303 NLRB 481, 485-486 (1991) (janitorial subcontractor could not ban union buttons just because client objected.)

The Hotel's argument would require the Board to overrule *Fabric Services*. In contrast to the repairman on temporary assignment, Ark's employees spend *all* of their work lives inside the Hotel. If the Hotel is correct, it could promulgate a rule forbidding "nonemployees" from displaying union

buttons on its property, on the theory that Ark employees have no *Republic Aviation* rights enforceable against the Hotel. So while food servers at other Nevada hotel-casinos have a right to wear union buttons, *Pioneer Hotel*, 324 NLRB at 921-923; 182 F.3d at 946, NYNY's theory would permit it to ban such buttons on its contractors' employees. This is not the law.

- **Access to property**

The same principle applies to off-duty access to non-work areas. Employees have a *Republic Aviation* right to such access, even if the property is not owned by the immediate employer.

Once a property owner has invited unionized contractors to its worksite, it may not assert a property right to bar the union representatives from servicing the contractor employees on site. *NLRB v. C.E. Wylie Construction Co.*, 934 F.2d 234, 239 (9th Cir. 1981) *enforcing* 295 NLRB 1050 (1989).

This rule did not change after *Lechmere*. The Board reasons that, by inviting other employers to perform work on its property, the owner has subordinated its property rights to the § 7 rights of its contractors' employees – in just as its own employees' workplace rights supersede its property rights. *CDK Contracting Co.*, 308 NLRB 1117, 1117-18 (1992); *Wolgast Corp.*, 334 NLRB No. 31 (2001) at 1 & ns. 3-4. *Lechmere* does not help the property owner

in this situation, because (unlike the union pickets in *Lechmere*) the contractor employees are present on its property by the owner's invitation. *Id.*

The same applies to the Hotel. Having voluntarily contracted with Ark to operate inside its facility, NYNY is not in a position to object when Ark employees bring their NLRA rights with them.

- **Exclusion of union supporters**

If the Hotel's theory is correct, the Board would have no power to prevent NYNY from barring pro-union Ark employees from its property outright. This would be no different, under the Hotel's theory, than its right to exclude outside union organizers from picketing on its property.

While the Hotel would violate the NLRA if it fired its *own* employees on this basis, 29 U.S.C. §158(a)(3), it could (according to the Hotel's theory) refuse to allow pro-union employees of *another* entity on its property. Just as the Hotel may enforce a blacklist against unwelcome outsiders (like drunks, card-cheats and union organizers,) it could declare that any known union activist not employed directly by NYNY may not enter its property.

This is not the law. To the contrary, it has long been the Board's policy that general contractors, landlords and customers violate the NLRA if they bar subcontractor employees from their property because of their union support.

International Shipping Ass'n, 297 NLRB 1059, 1059 (1990); *Jimmy Kilgore Trucking*, 254 NLRB 935, 946-947 (1981); *Georgia-Pacific Corp.*, 221 NLRB 982, 986 (1975). For the same reason, a general contractor violates the Act if it interrogates, promises or threatens the employees of subcontractor about their union activity. *Computer Associates Int'l*, 324 NLRB 285 n.2 (1997) *enforced in relevant part* 282 F.3d 849, 850 n.1 (D.C. Cir. 2002).

All of these cases contradict the Hotel's theory and would be swept away if it were adopted. Property owners do not have a free hand to squelch their contractors' employees' union activity. Their property right to exclude outsiders gives way to the NLRA rights of employees invited to work there.

2. *Hudgens* strongly supports the Board's original orders.

In this context, it is hard to see why the Hotel claims *Hudgens v. NLRB*, 424 U.S. 507, 521-522 (1976) and the Board's decision on remand, *Scott Hudgens*, 230 NLRB 414, 416 (1977) as authority for its position.

Hudgens found a protected § 7 right to picket inside a shopping mall on much weaker facts than those presented here. In *Hudgens*, the Board held that *off-site* warehouse employees had a § 7 right to picket a retail shoe store where

they themselves did not work, inside a shopping mall which did not employ them. 230 NLRB at 417-418.

The Hotel seeks consolation from the fact that, on remand, the *Hudgens* Board did not cite *Republic Aviation*. The Hotel seizes on the Board's language that "the employee status of the pickets here entitled them to at least as much protection as would be afforded to non-employee organizers as those in *Babcock & Wilcox*," 230 NLRB at 416. The Hotel reads this passage nonsensically to mean "the employee status of the pickets here entitled them to no more than the protection . . . afforded in *Babcock & Wilcox*."

The Hotel is grasping at straws. In remanding, the Supreme Court stressed that the mall tenant's employees are significantly different than the non-employees in *Babcock & Wilcox*. *Hudgens,* 424 U.S. at 521-522 & n.10. Because the off-site warehouse employees had a more attenuated status than the store's on-site employees, the Court left it for the Board to decide how they should be classified. 424 U.S. at 522-523. The Board repeated that employees have greater rights than non-employees, implicitly recognizing *Republic Aviation*. 230 NLRB at 416. In this context, the Board's explanation "[w]ith this principle in mind, the employee status of the pickets here entitled them to at least as much protection as . . . non-employee organizers" acknowledges what

the previous sentence made clear: "it is basic that Section 7 of the Act was intended to protect the rights of employees rather than non-employees." 230 NLRB at 416.

The *Hudgens* Board also noted that the shopping mall, while not the primary employer, was not a neutral bystander in its tenant store's labor dispute. 230 NLRB at 417. Because the shopping mall received a percentage of its tenant's sales as part of the rental arrangement, the mall's property rights were colored by its financial interest in the picketed store's business. *Id.* The Hotel is in the same position. Tr. 50-51 (Case No. 14519) (NYNY's revenues under lease based on percentage of Ark sales.)

The *Hudgens* Board held that even off-site employees have a § 7 right to picket customers at the shopping center. 230 NLRB at 416. The policy justifications for this rule have grown even stronger since 1977, as contracted and leased operations proliferate in most industries.

3. The Hotel's charge that Ark employees are "trespassing" is a circular argument.

For the same reason, the Hotel's claim that the Ark employees were "trespassing" begs the question.

By definition, all conduct that a property owner does not authorize is a "trespass" at common law. *See Eastex*, 437 U.S. at 579-583 (Rehnquist, J., dissenting) (objecting to Supreme Court's protection of workplace distribution of political literature, on grounds that it exceeded license given by property owner.) Prior to the NLRA, employers had an unlimited right to condition access to their property by inviting workers only to work, but not to hand out leaflets, solicit, or wear union buttons. When the Hotel claims that Ark employees are subject to a "conditional license" to work (but not to leaflet) on its property, it is making the same common-law argument rejected in *Republic Aviation* and *Eastex*.

Republic Aviation held that the Board may define § 7 workplace rights that supersede the owner's common-law property right. The NLRA authorizes the Board to define off-duty workers' rights to leaflet, speak, and solicit in non-working areas of their workplace, even if this is contrary to the owner's "conditional license" of entry. Of course, the Act does not create an open-ended vicarious right where the person seeking access is not employed in the workplace. *See Lechmere*, 502 U.S. at 534 and *Babcock & Wilcox*, 351 U.S. at 110. But once it is established that a worker is an employee on site, it begs the question to label his union activity "trespassing." If Ark employees act within

the protection of § 7, it does not matter that the Hotel wants them to stop, or that state property law might otherwise give it the power to evict them. "If employee conduct is protected under § 7, then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel Employees Local 54*, 468 U.S. 491, 501 (1984).

D. *Republic Aviation* rights cannot be confined to the contractor's leasehold.

The Court's next question concerns whether *Republic Aviation* rights can be confined to the contractor employer's leasehold. The Board cannot frame a satisfactory rule along these lines.

Most contractors have *no* property rights to the premises at all, including construction subcontractors, security services, janitorial services and temporary agencies. These employers typically have nothing but a contractual license to enter with their employees, and perform services on property. Even where the contractor has some defined base in the facility, its employees are not usually confined there. In this case, Ark employees work throughout the Hotel, carting supplies and delivering room service. Their meal periods are also spent outside Ark's restaurants. They use the NYNY employee cafeteria for their meal breaks.

Tr. 120-121, GC Ex. 5, §6.3 (Case No. 14519), Tr. 47 (Case No. 15148). If the Hotel's theory is correct, NYNY could bar Ark employees from leafleting in the common employee cafeteria, on the ground that this is outside Ark's leasehold.

Even where the contractor has some *internal* niche in the facility, its employees will not have access to the *external* non-work areas of the property, like parking lots and entrances. This external access is what the Board has consistently preserved for off-duty employee activity under *Tri-County Medical Center*, 222 NLRB 1089 (1976).

II. OFF-DUTY EMPLOYEES HAVE THE SAME *TRI-COUNTY* RIGHTS AFTER SHIFT AS DURING THEIR BREAK PERIODS.

The Hotel complains that the Ark employees were not handbilling during a break in their scheduled shift, but had returned to the property after their shift ended. The Court of Appeals has asked the Board to explain whether this makes a difference to their access rights.

This does not make a difference. To begin with, this distinction contradicts the Hotel's primary argument. If the Hotel may enforce its property right unrestricted by Ark workers' § 7 rights, it may prohibit any handbilling on

its property, whether during breaks or after shift. The Hotel's attempt to soften its position (by proposing a distinction between break time and after-shift time) undermines the logic of its main theory.

Once it is established that Ark employees enjoy *Republic Aviation* rights on the same terms as NYNY employees, the Hotel's objections are futile. The Hotel is just complaining about the existing state of *Republic Aviation* access law. The right of workers to return to exterior non-work areas of their workplace after their shift is a basic feature of access law under *Tri-County Medical Center*, 222 NLRB at 1089. The D.C. Circuit has summarily enforced Board orders protecting the *Tri-County* rights of off-duty hotel workers to return to hotel property after their shift. *Lafayette Park Hotel*, 326 NLRB 824, 828-829 (1998) *enforced without opinion* 203 F.3d 52 (D.C. Cir. 1999).

This is the normal operation of the Board's *Tri-County* access policy. *See Santa Fe Hotel*, 331 NLRB 723, 723-724 (2000) (off-duty workers had access right to non-work areas of employer's property after shift); *Nashville Plastic Products*, 313 NLRB 462, 463 (1993) (same; rejecting argument that after-shift employees may be barred as "strangers" under *Lechmere*); *Orange Memorial Hospital*, 285 NLRB 1099, 1100 (1987).

The rationale for distinguishing off-duty employees from strangers is a strong one. Unlike a stranger, an off-duty employee is subject to the property owner's managerial control – through identification and sign-in rules, as well as the power to direct the contractor to discipline the employee for any off-duty misconduct on the property. *Hillhaven Highland House*, 336 NLRB No. 62 at 4-5. Even though it is not the immediate employer, NYNY has negotiated the right (through its contract with Ark) to regulate the conduct of Ark's employees. GC Ex. 5 (Case 14519) § 6.1 (NYNY agreement with Ark, mandating drug testing for Ark employees). NYNY may also require Ark to discipline employees who violate NYNY's reasonable regulations on Ark employees' conduct. GC Ex. 5 (Case 14519) § 11. This managerial power over off-duty workers gives property owners a measure of security that they lack for outsiders. *Hillhaven Highland House*, 336 NLRB No. 62 at 4-5.

For this reason, the courts have consistently rejected any distinction between *Tri-County* rights of employees *after* their shifts from the same rights during break periods. *See, e.g., NLRB v. Clark Manor Nursing Home*, 671 F.2d 657, 660 (1st Cir. 1982) *enf'g in relevant part* 254 NLRB 455 (1981); *NLRB v. Pizza Crust Co.*, 862 F.2d 49, 52 (3d Cir. 1988) *enf'g* 286 NLRB 490 (1987); *NLRB v. Ohio Masonic Home*, 892 F.2d 449, 451-452 (6th Cir.1989) *enf'g* 290

NLRB 1011 (1988); *NLRB v. Presbyterian Medical Center*, 586 F.2d 165, 167 (10th Cir. 1978) *enf'g* 227 NLRB 904 (1977).

The Board should adhere to and explain this judicially approved policy in answering the D.C. Circuit's remand.

III. SECTION 7 PROTECTION FOR OFF-DUTY COMMUNICATION CANNOT DEPEND ON THE AUDIENCE TO WHOM THE WORKERS SPEAK.

Finally, the Hotel complains that the Ark employees were distributing leaflets to customers, and not to other employees. The Court asks the Board to address whether this makes a difference for their Section 7 protection.

A. *Stanford Hospital v. NLRB* controls this case.

Four months after the remand order in this case, the D.C. Circuit answered its own question in *Stanford Hospital and Clinics v. NLRB*, 325 F.3d 334, 342-345 (D.C. Cir. 2003), *enf'g in relevant part* 335 NLRB No. 42 (2001). The Court followed *Eastex, Inc. v. NLRB*, 437 U.S. 556, 572-573 (1978) to hold that off-duty employees have the same § 7 right to solicit and distribute to nonemployees on their employer's property as they do to fellow employees. The D.C. Circuit endorsed *Santa Fe Hotel*, 331 NLRB 723, 730 (2000) (Chairman Truesdale and Members Brame and Hurtgen: the fact that off-duty

employees distributed leaflets to customers in non-work areas of a Las Vegas hotel is "a distinction without a difference and is an irrelevant consideration") and *NCR Corp.*, 313 NLRB 574, 576 (1993) (Chairman Stephens and Members Devaney and Raudabaugh: "the right of employees to distribute union literature during nonworktime and nonwork areas is not limited only to distribution to prospective union members. Employees have a statutorily protected right to solicit sympathy, if not support from the general public, customers, supervisors, or members of other labor organizations.") *Stanford Hospital*, 325 F.3d at 343 (endorsing *Santa Fe Hotel* and *NCR Corp.*).

The D.C. Circuit's conclusion in *Stanford Hospital* was based on its reading of the Supreme Court's decisions in *Eastex* and *Lechmere*. The D.C. Circuit rejected the hospital's argument that *Lechmere* allows employers to prevent off-duty employees from soliciting customers:

> Stanford misreads *Lechmere*. Having nothing to do with whether employees may solicit nonemployees, that decision turns on the fact that the NLRA's plain language "confers rights only on employees, not on unions or their nonemployee organizers." *Lechmere*, 502 U.S. at 532. What matters under *Lechmere* is not the identity of a solicitor's intended audience (nonemployees in this case), but whether the solicitor is employed by the property owner or is otherwise lawfully on the employer's property.

325 F.3d at 343.

The Board is not free to reject the D.C. Circuit's analysis in *Stanford Hospital*. *Stanford Hospital* was based on the Court's independent construction of *Eastex* and *Lechmere*. It was not merely deferring to the Board's judgment, because the D.C. Circuit will not defer to the Board in interpreting the Supreme Court's interpretations of the NLRA. *See New York New York v. NLRB*, 313 F.3d at 590.

B. *Stanford Hospital* affirms the Board's historic policy.

Stanford Hospital upheld a well-established Board policy as consistent with Supreme Court law.

The Hotel has no right to demand that Ark employees write their leaflets only for each other, but not to the public. As a matter of policy, it would be unworkable for the Board to protect only those leaflets whose content was written for fellow employees, but not those whose message also appealed to the general public. Once it is established that the employees are "already rightfully on the employer's property," the employer's interest in regulating their activity is solely a managerial one, and one that "does not vary with the content of material [that the employees disseminate.]" *Eastex, Inc. v. NLRB*, 437 U.S. 556, 572-573 (1978). As the Supreme Court explained:

> [P]etitioner's reliance on its property right is largely misplaced. Here, as in *Republic Aviation*, petitioner's employees are "already rightfully on the employer's property," so that in the context of this case it is the "employer's management interests rather than [its] property interests" that primarily are implicated. *Hudgens*, *supra*, 424 U.S., at 521-522, n.10. . . . Even if the mere distribution by employees of material protected by § 7 can be said to intrude on petitioner's property rights in any meaningful sense, the degree of intrusion does not vary with the content of the material.

Eastex, 437 U.S. at 572-573. This is the reasoning the D.C. Circuit applied in *Stanford Hospital*, 325 F.3d at 343-344.

The Board has consistently adhered to this policy protecting appeals to the public under *Tri-County*, through each of the last three administrations. *See Santa Fe Hotel*, 331 NLRB 723, 730 (2000) (Chairman Truesdale and Members Brame and Hurtgen); *A-1 Schmidlin Plumbing*, 312 NLRB 201 n.3 (1993) (Chairman Stephens and Members Devaney and Raudabaugh, holding that off-duty employee leafleting directed at customers is protected under *Republic Aviation*); *NCR Corp.*, 313 NLRB 574, 576 (1993) (same). The *Hudgens* Board allowed off-site warehouse employees inside the mall to picket *customers* inside the mall, not just each other. 230 NLRB at 415. The picketing protected in *Hudgens* was not confined to a service entrance; it was set up across the

customer entrances of the mall store. 424 U.S. at 509; 230 NLRB at 415. This is no different than the handbilling at issue here.

The D.C. Circuit joins the consensus of the reviewing courts, in agreement with the Board, that on-site communications to customers enjoy the same § 7 protection as those to fellow employees. *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1291 (6th Cir. 1998) (employee communication to client about work issues was protected activity); *Handicabs, Inc. v. NLRB*, 95 F.3d 681, 684 (8th Cir. 1995) (employer could not prohibit bus driver from discussing company-related problems with passengers); *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 216-217 (9th Cir. 1989) (newspaper employees' letter to advertisers about labor situation protected).

C. Owners may prevent inflammatory leaflets, but not all leaflets.

Of course, the owner already has the power under *Republic Aviation* to prohibit distribution of obscene or inflammatory material. *Eastex*, 437 U.S. at 573 n.22, *citing Procter & Gamble Mfg. Co.*, 160 NLRB 334, 395 (1966). But there is no such claim here: the leaflets were dignified and rational, *see* 334 NLRB No. 87 at 7, like the leaflets in *Stanford Hospital*, 335 NLRB No. 42.

D. The Hotel does not prove any actual likelihood of disruption.

The Hotel does not meet any burden of proof that casino customers are a sensitive group who might be harmed by a leaflet. Unlike hospital patients, Las Vegas casino patrons are not a vulnerable class, nor does the Hotel offer to prove otherwise. The Eighth Circuit enforces the Board's order that workers may not be silenced from making pro-union statements, even to disabled and elderly persons confined in a shuttle van. *Handicabs*, 95 F.3d at 684-685. This policy should not change for blackjack players.

A contrary rule would force employee leafletters to challenge passers-by to identify themselves before passing them a leaflet. This would entail much more disruption than simple distribution. In addition to being challenged for their identity, customers would suffer the disquiet of being told that they are *forbidden* to receive top-secret material bearing on undisclosed "labor problems" brewing inside the Hotel.

The Board's policy allowing leafletting without verbal challenges to the recipients is consistent with the Supreme Court's treatment of leafleting in constitutional cases. The Court views leafletting as the least disruptive (and therefore most protected) form of speech inside enclosed areas like airports. In

ISKCON v. Lee, 505 U.S. 672 (1992), the Court held 6-3 that in-person solicitation of funds could be prohibited in airports, but in a companion case, *Lee v. ISKCON*, 505 U.S. 830 (1992), a different majority held 5-4 that leafleting in such places may not be prohibited, even under the weaker protections of the First Amendment. The concurrences of Justices O'Connor and Kennedy are controlling as the narrowest reading of both judgments. Justice O'Connor explained why leafleting does not pose the same problem in public areas as more invasive forms of speech:

> [W]e have expressly noted that leafleting does not entail the same problems presented by face-to-face solicitation. Specifically, '[o]ne need not ponder the contents of a leaflet or a pamphlet in order mechanically to take it out of someone's hand. . . . The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead the recipient is free to read the message at a later time.'

Lee, 505 U.S. at 690 (O'Connor, J. concurring), *quoting U.S. v. Kokinda*, 497 U.S. 720, 734 (1990). Justice O'Connor concluded: "With the possible exception of litter [cit.om.] it is difficult to point to any problems intrinsic in the act of leafleting that would make it naturally incompatible with a large, multi-purpose forum such as [an airport terminal.]" *Id.*; *see also* 505 U.S. at 708 (Kennedy, J., concurring, joined by Blackmun, Stevens and Souter, JJ.)

This reasoning applies with greater strength to the non-selling areas of New York New York. The porte-cochere and restaurant entrances are even more open than the airport terminal in *Lee*. On-site employees' § 7 right to leaflet is far stronger than the weaker First Amendment right at issue in *Lee*. *See Hudgens*, 424 U.S. at 520-522. If such employees are forced to demand each passer-by's identity as a condition of handing over the leaflet, the leafleting will become more intrusive, not less. The Board should follow *Lee*'s discussion of leafleting when considering the stronger statutory policies of *Republic Aviation*.

CONCLUSION

The Board should adhere to its prior decisions in these cases on remand.

DATED: May 14, 2003

Respectfully Submitted,

DAVIS COWELL & BOWE

Michael T. Anderson
1155 15th Street, NW, #405
Washington, D.C. 20005
Ph: (202) 223-2620
Fax: (202) 223-8651

McCRACKEN, STEMERMAN,
BOWEN & HOLSBERRY

Richard G. McCracken
1630 S. Commerce Street, A-1
Las Vegas, Nevada 89102
Ph: (702) 386-5107
fax: (702) 386-9848

Attorneys for Charging Party
Local Joint Executive Board of Las Vegas,
Culinary Workers Union, Local 226 &
Bartenders Union, Local 165

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AFFIDAVIT OF SERVICE
DISTRICT OF COLUMBIA

I am employed in the Washington, District of Columbia. I am over the age of 18 and not a party to the within action; my business address is: 1155 15th Street, N.W. Suite 405, Washington D.C. 20005.

On May 16, 2003, I cause the document(s) described as POSITION STATEMENT OF CHARGING PARTY LOCAL JOINT EXECUTIVE BOARD, CULINARY WORKERS UNION LOCAL 226 and BARTENDERS UNION LOCAL 165 in this action to be served by hand addressed as follows:

Celeste Wasielewski
Piper Rudnick, LLP
901 15th Street, N.W.
Washington, D.C. 20005-2301
(202) 371-6279

Attorneys for Respondent
New York New York Hotel

Gary C. Moss
Piper Rudnick, LLP
McPherson & Hand
3960 Howard Hughes Parkway
Las Vegas NV 89109
(702) 737-1612

Attorneys for Respondent
New York New York Hotel

Nathan W. Albright
National Labor Relations Board
Region 28
600 Las Vegas Boulevard, S. Suite 400
Las Vegas, Nevada 89101-6637
(702) 388-6248

Attorney for General Counsel

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I declare under penalty of perjury under the laws of the District of Columbia that the above is true and correct.

Michael T. Anderson