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	Case Nos. 28-CA-14519 and 28-CA-15148 Argument date: November 9, 2007

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

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CHARGING PARTY'S PRE-ARGUMENT BRIEF

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This case has been pending for five years since the remand in *New York New York Hotel v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002). In the intervening time, both the D.C. Circuit and the Board have already answered the questions posed in the *New York New York* remand.

We adhere to our May 16, 2003 position statement on remand. This pre-argument brief updates that position statement, to show why intervening decisions have settled the issues in this case.

FACTUAL BACKGROUND

The facts are set forth in *New York New York Hotel & Casino*, 334 NLRB 762 (2001) and *New York New York Hotel & Casino*, 334 NLRB 772 (2001), as well as the companion decisions in *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1289-90 (2001) *enfd. in part and remanded in part*, *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 107-108 (D.C. Cir. 2003) *adhered to on remand*, *Ark Las Vegas Restaurant Corp.*, 343 NLRB 1281 (2004). We discuss particular factual points in the Argument.

SUMMARY OF ARGUMENT

A. Subsequent decisions of the D.C. Circuit and the Board answer the questions posed by the 2002 remand order.

The Board and the D.C. Circuit have already addressed the questions posed in the remand order.

In *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 107-108 (D.C. Cir. 2003) and *Ark Las Vegas Restaurant Corp.*, 343 NLRB 1281, 1283-84 ns. 9-11 (2004), the D.C. Circuit and the Board held that Ark employees do have a Section 7 right of access to the external, non-work areas of New York New York's ("NYNY's") hotel outside Ark's restaurants. (Part I, below.)

In *Stanford Hospital and Clinics v. NLRB*, 325 F.3d 334, 342-345 (D.C. Cir. 2003), the Court interpreted *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563 (1978) to hold that off-duty employees have the same Section 7 right to communicate to customers as they do to employees. The Board has followed *Stanford Hospital*, as recently as six weeks ago in *Carney Hospital*, 350 NLRB No. 56 at 2, 18 (Aug. 13, 2007). (Part II, below.)

This case provides an opportunity to explain the Board's rationale further, but the underlying outcome has been decided.

B. Source of Ark employees' rights against NYNY

Ark employees do not claim rights derived from any other employee. They claim their own rights to organize and solicit support outside their own workplace. (Part III.A. below.)

It is an illusion to claim that Ark workers have NLRA rights within Ark's "leasehold." Ark's lease gives NYNY substantial control over the restaurants, including the rules of employee conduct. Ark employees spend much of their working and break time outside the restaurants. If NYNY is not bound by any duty to Ark employees' NLRA rights, there is no reason why it could not prohibit union activity even inside the "leasehold." (Part III.B.)

In any case, most subcontractors in the increasingly outsourced American economy have no "leasehold" whatsoever. The Hotel's approach would leave their employees no space for union activity, since under the Hotel's theory no subcontractor employee would be able to enforce Section 7 rights against an unwilling property owner. (Part III.C.)

The Act does not permit this result. The framers of the Act went to great lengths to stress that Section 7 creates generally enforceable rights for workers, not merely specific regulations of their immediate employers.

This is what the Supreme Court held in *Hudgens v. NLRB*, 424 U.S. 507, 510 n.3 (1976). (Part III.D.)

The Hotel's property rights are no different as between Ark employees and its own employees. The Board cannot invent some distinction giving the former fewer rights than the latter, without abandoning the core principles of the Act. (Part III.E.)

Nor may the Board split the difference by giving Ark employees the right to hand out <u>some</u> messages on Hotel property, but not the full range of messages that the Hotel's own employees may distribute. This approach would make the Board's rationale incoherent. If the Hotel has a property right to exclude union activity, it has such a right regardless of the employees' message. If it lacks the right to exclude, *Eastex* rejects managerial censorship of the content of protected appeals. (Part IV.)

It makes no difference that the Ark employees here returned after their shifts, rather than taking their break time. The D.C. Circuit's question on this point is answered by the body of court-approved caselaw under *Tri-County Medical Center*, 222 NLRB 1089 (1976). (Part V.)

Finally, we note that the Charging Party Union is not bound by the General Counsel's frequent changes of position in this case. (Part VI.)

<u>ARGUMENT</u>

<u>Intervening Caselaw Controls the Outcome</u>

I. Ark Employees Have Section 7 Access to Exterior Areas of Hotel Property: *Ark Las Vegas Restaurant Corp.*

The outcome of this case has been decided in *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 107-108 (D.C. Cir. 2003) and *Ark Las Vegas Restaurant Corp.*, 343 NLRB 1281, 1283-84 ns. 9-11 (2004). This case involves the same employees, the same exterior areas of the Hotel, and the same Section 7 rights at issue in the *Ark* companion case.

In *Ark Las Vegas*, the D.C. Circuit and the Board held that Ark employees <u>do</u> have a Section 7 right of access to the external areas of New York New York's ("NYNY's") hotel outside Ark's restaurants.

A. The *Ark* Decisions

1. The Board's initial ruling that Ark workers enjoy *Tri-County* rights on hotel property: *Ark I*.

In *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1289-90 (2001) ("*Ark I*"), the Board had dealt with work rules in the Ark employee handbook forbidding Ark employees from:

- "[R]eporting to property more than 30 minutes before a shift is to start or staying on property more than 30 minutes after a

shift ends unless authorized by a supervisor," and

- "Returning to the Company's premises, other than as a guest, during unscheduled hours unless authorized by management."

This conduct is exactly what Edward Ramis, John Ensign, Donald Goodman and Ron Isomura were arrested for in *New York New York Hotel*, 334 NLRB at 768; 334 NLRB at 776.

In *Ark I*, the ALJ dismissed the complaint as to no-solicitation rules imposed on nonemployee union organizers, citing *Lechmere* and *Babcock & Wilcox.* 335 NLRB at 1290. But the ALJ (affirmed by the Board) concluded that these rules violated off-duty Ark workers' rights to communicate outside their workplace under *Tri-County Medical Center*, 222 NLRB 1089 (1976). *Id*.

2. *Ark* in the D.C. Circuit: Ark employees have an obvious right of Section 7 access to Hotel property.

On Ark's petition for review, the D.C. Circuit noted a lack of clarity in the Board's order. The D.C. Circuit questioned whether the no-solicitation rules could really be read to apply to "the area outside Ark's leasehold – including the surrounding hotel, casino, and parking lot." 334 F.3d at 109. This is the area at issue here.

Unlike the *NYNY* panel six months earlier, the D.C. Circuit panel in *Ark* had no doubt that Ark employees had such a *Tri-County* right of access to the hotel's public areas. On the contrary, the only problem for the *Ark* Court was that Ark employees' right to solicit support in the hotel's public areas was so clear that the Court questioned whether any Ark employee could feel inhibited by the no-solicitation rules. 334 F.3d at 110-111. The Court was clear that such a rule would be unlawful: "We agree that if Ark had such a rule, the justifications the employer offered would not support it." 334 F.3d at 109.[1]

The D.C. Circuit's opinion in *Ark* answers the central question posed six months earlier in *New York New York v. NLRB*. In *New York New York,* the D.C. Circuit asked whether Ark employees are "invitees of some sort but with rights inferior to those of NYNY's employees" outside Ark's leasehold, or whether it matters for their Section 7 rights that "the Ark employees here had returned to NYNY after their shifts had ended

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[1]Ark and NYNY have at all times been represented by the same counsel in both tracks of this litigation. In the *Ark* litigation, Ark disclaimed any liability for NYNY no-solicitation policy, arguing that any restrictions by NYNY on Ark employees do not render *Ark'*s rules unlawful. 343 NLRB at 1284 n.11. In this half of the litigation, NYNY (through the same counsel) asserts that it owes no duty to Ark's employees at all.

and thus might be considered guests, as NYNY argues." 313 F.3d at 590. In *Ark*, a later panel of the Court held that if Ark "denied off-duty employees entry to the area *outside* Ark's leasehold -- including the surrounding hotel, casino, and parking lot," such a rule would not be justified. 334 F.3d at 109. *Id*. The D.C. Circuit in *Ark* was clear that off-duty Ark employees do enjoy *Tri-County* access rights in the surrounding hotel property. The Court remanded in *Ark* because it was clear to that panel (as it had not been to the earlier *NYNY* panel) that off-duty Ark workers have Section 7 rights in the surrounding hotel property, so much that Ark employees might not even read the rule to inhibit protected activity at all. 334 F.3d at 111.

3. The Board's decision on remand: *Ark II*

On remand, the Board adhered to its original decision. *Ark Las Vegas Restaurant Corp.*, 343 NLRB 1281, 1283-84 ns. 9-11 (2004).

The Board majority explained that Ark employees would reasonably feel inhibited from Section 7 exercise in the surrounding areas of NYNY's hotel, precisely because NYNY's stated policy is to prohibit such exercise. 343 NLRB at 1284. The Board noted that NYNY controls the Ark employee handbook, as Ark itself tells its employees: "Many of our

policies in our handbook are in part the result of our tenancy at the New York-New York Hotel Casino. Employee entrances, parking, drug testing, name tags, conduct at the hotel while off and on duty are just some of the rules we have included as it relates to Hotel policies, not necessarily our policies." 343 NLRB at 1283 (quoting Ark employee handbook.) While NYNY invites Ark employees to drink and gamble in the complex, the Board noted that the Hotel seeks to prohibit any Section 7 exercise. The Board held that this prohibition (reflected in Ark's no-access rules) violated Ark employees' Section 7 rights. *Id.*, 343 NLRB at 1284 & n.11.

Chairman Battista dissented, but his dissent does not help NYNY's position. 343 NLRB at 1285. Chairman Battista did not question that Ark employees have Section 7 rights outside Ark's restaurants. To the contrary, Chairman Battista held that no Ark employee could reasonably think that those rights were in jeopardy: "The Section 7 right involved herein is the right of employees to engage in Section 7 activity during their off-duty hours. . . . I would not infer that a reasonable employee would read rules 30 and 45 as prohibiting Section 7 activity outside the restaurants." 343 NLRB at 1285.

Ark did not seek review of the Board's 2004 order. Yet now NYNY asks the Board to do an about-face as to the same Ark employees, the same exterior areas of the Hotel, and the same Section 7 rights at issue in *Ark*. If NYNY is correct, the Board and the D.C. Circuit in *Ark* were completely wrong: far from being self-evident, NYNY now maintains that Ark employees' right to Section 7 exercise outside the restaurants is actually non-existent.

This is not a persuasive argument. The Board and the D.C. Circuit must administer a stable body of law. The Board in *Ark II* denied the Union's motion to consolidate *Ark* and *NYNY*, assuring that it was "unnecessary to formally link these cases in order to ensure that our decisions are consistent." 343 NLRB at 1281 n.3. Yet the Hotel is asking for the Board to reach just such an inconsistent result. Having decided after the *NYNY* remand that Ark employees do have a right to Section 7 exercise in the exterior areas of hotel property, the Board may not switch the outcomes here.

B. *Ark* Controls this Case.

Neither the D.C. Circuit's *Ark* opinion nor the Board's decision on remand can be distinguished here.

1. The Board's statutory concern is Section 7 exercise, not off-duty drinking or gambling.

The Hotel may try to distinguish *Ark* by claiming that it only recognized Ark employees' rights to drink and gamble on Hotel property, and not a Section 7 right to solicit support.

This is nonsense. The Board issued a remedial order in *Ark II* to protect Section 7 rights on Hotel property, not the "right" to drink and gamble. 343 NLRB at 1283-84. The Board has no statutory interest in off-duty workers' drinking and gambling. The Board only has the authority to issue a remedial orders to protect NLRA rights to organize. The right of access recognized in *Ark* is relevant only to the extent it entails Section 7 activity.

2. The change in the Respondent's identity cannot change the outcome in *Ark*.

In response to *Ark II*, the Hotel appears to argue that, while it may be unlawful for Ark to prohibit its employees from soliciting support on Hotel property, the Hotel itself is free to do so because the same people are non-employees as to the Hotel. *See* January 5, 2005 letter from NYNY counsel to the Board. This is merely the converse of the argument rejected in *Ark II*. 343 NLRB at 1284 n.11.

This trivializes the Board's order. When an off-duty Ark worker like Donald Goodman solicits support outside his workplace, the police are now be called to arrest him as a "trespasser." It makes little difference to Goodman whether Ark or NYNY made the call to the police. The answer that Goodman and the police need to have is whether Goodman has a right to be there. It is sophistry to say he has such a right, but only against Ark.

In any case, NYNY's attempt to distinguish *Ark II* proves too much. If NYNY has a right to prohibit off-duty Ark employees from Section 7 activity on hotel property, then it would have been both lawful and necessary for Ark to forbid that activity in its Employee Handbook. Ark is contractually liable to NYNY to ensure that its employees do not violate NYNY's rules and regulations. *See* 343 NLRB at 1283; GC Ex. 5 (Case 15148), Lease at §8.9. So if NYNY may lawfully forbid off-duty Ark employees from handbilling on hotel property, then Ark had a contractual duty to keep its employees from violating those rules. If this is true, then both the D.C. Circuit and the Board were utterly wrong in *Ark*. The Board cannot adopt NYNY's position without overruling *Ark,* and rejecting the D.C. Circuit's *Ark* opinion.

II. Ark Employees Have the Same Right to Communicate with the Public as They Do with Fellow Employees: *Stanford Hospital.*

The Hotel complains that the Ark employees gave leaflets to customers, and not just to other employees. In 2002, the D.C. Circuit asked the Board to explain whether this makes a difference: "Is it of any consequence that the Ark employees were communicating, not to other Ark employees, but to guests and customers of NYNY (and possibly customers of Ark)?" 313 F.3d at 590.

A. *Stanford Hospital* Answers the Question Posed in *NYNY.*

Four months after this remand order, 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 488 (2001). The D.C. Circuit 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 the general public as they do to fellow employees. The D.C. Circuit in *Stanford Hospital* 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.

B. *Stanford Hospital* Is the D.C. Circuit's Own Reading of *Eastex* and *Lechmere*, Without Deference to the Board.

The D.C. Circuit was not merely deferring to the Board's variable construction of the Act. *Stanford Hospital* was based on the D.C. Circuit's own 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 344 (emphasis added.)

As the D.C. Circuit made clear four months earlier in *NYNY*, the Court of Appeals does not defer to the Board in interpreting Supreme Court precedent. *New York New York*, 313 F.3d at 590. The D.C. Circuit's construction of *Eastex* and *Lechmere* in *Stanford Hospital* is therefore the Court's own answer to the *NYNY* panel's question. The Board may not change its interpretation of *Eastex*, and expect the Court to do the same.

C. The Board Consistently Follows *Stanford Hospital*.

This Board has consistently followed *Stanford Hospital*. The Board rejected the distinction NYNY urges six weeks ago in *Carney Hospital*, 350 NLRB No. 56 at 2, 18 (2007) (Chairman Battista, Members Schaumber and Walsh, unanimously adopting an ALJ order against a rule forbidding off-duty, on-property solicitation of customers: "The Respondent contends that its rule is permissible because employees only have the right to solicit and distribute to 'other employees, not clients of the institution.'... [*quoting Stanford Hospital:*] '[N]either this court nor the Board has ever drawn a substantive distinction between solicitation of fellow employees and solicitation of nonemployees. To the contrary, both

we and the Board have made clear that [National Labor Relations Act] sections 7 and 8(a)(1) protect employee rights to seek support from nonemployees.'" *Carney Hospital*, 350 NLRB No. 56 at 18. *See also Bigg's Foods*, 347 NLRB No. 39 (2006) at 1-2 & ns. 8-10 (Members Liebman, Kirsanow and Walsh: "we agree with the General Counsel that *Santa Fe Hotel & Casino* is the appropriate analysis. Applying that standard, we adopt the judge's finding that the Respondent unlawfully prohibited its off-duty employees from distributing union handbills to customers.")

NYNY is asking the Board to make an unprincipled exception to this rule of law. Once the Board adheres to its 2004 *Ark* decision (that off-duty Ark employees do have Section 7 rights in the exterior areas of the Hotel), it cannot make a principled distinction against customer appeals without repudiating *Stanford Hospital*.

Explaining the Rationale

Although the D.C. Circuit and the Board have resolved the outcome, this case is an opportunity for the Board to clarify its rationale.

III. The Source of On-Site Subcontractor Employees Rights

The D.C. Circuit's first three questions in its 2002 remand order ask whether 1) Ark employees have the same rights on NYNY property as non-employee union organizers, which is to say no rights all[2]; 2) Ark employees exist in some second-class limbo with more rights than an outsider, but fewer rights than an NYNY employee, or 3) whether Ark employees enjoy the same Section 7 rights as NYNY employees. The first two alternatives would cripple the enforcement of the Act.

A. Ark Employees Are On-Site Employees Claiming Their Own Section 7 Rights, Not Those of Other Employees.

New York New York argues that restaurant workers inside its hotel 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).

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[2]No party suggests that the Las Vegas Strip is equivalent to a remote logging camp or an Alaskan fish cannery, or that Ark employees would have any chance of gaining access if the nonemployee standards of *Babcock & Wilcox* applied. Indeed, the ALJ in *Ark I* specifically dismissed the complaint against Ark's no-solicitation rules to the extent that they barred "nonemployees." 335 NLRB at 1290.

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.

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 at 762. This is the only place where they work. If off-duty Ark workers do not have *Tri-County* rights outside their workplace, they have no such rights anywhere.

Ark employees like Ron Isomura do not claim some vicarious connection to the property borrowed from other workers, as the outside union organizers did in *Babcock & Wilcox* and *Lechmere*. Ark workers have the same connection to the property where they work as NYNY's own employees do. Their claim for nonderivative Section 7 rights is far stronger than the claim of off-site employees upheld in *Hillhaven Highland House*, 336 NLRB 646, 648 (2001) *enfd.* 344 F.3d 523, 528-530 (6th Cir. 2003) and *ITT Industries*, 341 NLRB 937 (2004) *enfd.* 413 F.3d 64 (D.C. Cir. 2005). In those cases, the solicitors' only connection to the property was that they worked for the same employer at some distant

location. Here, the Ark workers are soliciting support in their <u>own</u> labor dispute on the premises outside their <u>own</u> workplace.

The decisions in *Ark* that these workers do have § 7 rights on hotel property cannot be reconciled with the status of "nonemployees." If they are nonemployees, they have no right to Section 7 exercise on hotel property under *Lechmere* and *Babcock & Wilcox*. If the Hotel were legally correct to exclude off-duty Ark workers as "nonemployees," the Board's order and the D.C. Circuit opinion in *Ark* would be pointless.

B. The Myth of the Subcontractor's "Leasehold"

The Hotel rationalizes that Ark employees have enforceable *Republic Aviation* rights inside Ark's "leasehold," because there Ark is supposedly the property owner. This argument treats Ark's restaurants as islands of sovereignty within the complex. Outside these boundaries, however, NYNY argues that Ark workers are "nonemployees" with no rights against NYNY.

This argument is based on an illusion. The phrase "leasehold" falsely suggests that Ark is comparable to a residential tenant, whose restaurant is a fortress against NYNY control. This is not the reality. Subcontractors like Ark typically have no genuine "leasehold," in the

classical sense of exclusive control for the duration of the lease. Most subcontractors have no "leasehold" at all on the property. Even here, where NYNY and Ark style their subcontract as a "lease," NYNY remains a supervising entity with a contrtactual right to regulate its "tenant's" employees even inside the restaurant.

1. Ark does not have exclusive control of its "leasehold."

A closer look at the NYNY/Ark "lease" shows how much residual power NYNY retains over the restaurant.

This is not a conventional lease in which the landlord's only interest is a fixed rent. NYNY's revenues under its lease to Ark are a share of Ark's sales. Tr. 50-51 (Case No. 14519), GC Ex. 5 (Case 15148), Lease at §4.4-4.10. NYNY and Ark are more like a joint venture than a conventional landlord and tenant.

NYNY controls Ark's employee handbook policies, Tr. 50 (Case No. 14519). This is exactly why the *Ark II* Board held that Ark workers would reasonably view Ark's no-solicitation rules as dictated by NYNY. 343 NLRB at 1283-84 & n.11. The lease gives NYNY the power to promulgate rules of Ark employee conduct both inside and outside the restaurants "for the preservation of order thereon or to assure the operation

of a first-class resort hotel facility.") GC Ex. 5 (Case 15148), Lease at §8.9. NYNY is adamant that, in its view, solicitation on hotel property is contrary to those rules. It permits its own NYNY employees to engage in such activity only because the NLRA requires it, but it denies Ark workers the same privilege solely because they work for NYNY's subcontractor.

Under NYNY's theory, this means Section 7 rights are not safe even inside the restaurants. If NYNY were to disapprove union buttons or break-time solicitation inside the restaurants, there is no reason that NYNY could not prohibit them under its theory. It would be no answer that such *Republic Aviation* rights would be protected against Ark. NYNY's core theory here is that employees' NLRA rights against Ark do not protect them from their "non-employer" NYNY.

If this is true, then it does not matter whether the Section 7 activity occurs inside or outside the restaurant. If NYNY is free to treat Ark workers as "nonemployees" under *Lechmere*, there is no reason why it may not forbid Section 7 exercise even inside the restaurants.

2. Ark employees work and take breaks outside Ark's restaurants.

Nor are Ark employees confined to the restaurant during their work day. 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 in common with employees of NYNY and another subcontractor. GC Ex. 5, §6.3 (Case No. 14519), Tr. 47, 120-121 (Case No. 15148). NYNY reserves the power to regulate Ark employees' conduct in the employee cafeteria. GC Ex. 5, §6.3 (Case No. 14519).

If the Hotel is right, it could forbid Ark employees 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 "nonemployee" union activists employed by Ark as freely as it bars outside union pickets.

3. Most subcontractors have no property rights in the workplace.

The Board cannot make a coherent policy out of NYNY's "leasehold" argument.

Most subcontractors have *no* property rights to the premises at all. Workers who are employed by construction subcontractors,[3] longshore and warehouse contractors,[4] security services,[5] janitorial services,[6] food

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[3]In the construction industry, the property owner and general contractor typically divide 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). Construction subcontractors typically do not own any "leasehold" over their work space on a construction site. Yet the Board has consistently defended the §7 rights of on-site subcontractor employees against property owners and general contractors, despite the absence of a direct employment relationship. *Wolgast Corp.*, 334 NLRB 203 (2001) *enfd.* 349 F.3d 250 (6th Cir. 2003); *CDK Contracting Co.*, 308 NLRB 1117, 1117-18 (1992).

[4]Stevedores normally work on piers and wharves owned by someone other than their immediate employer. Dock facilities are typically owned by port authorities or marine terminals, leaving the longshore work to be performed by subcontractors or tenants, who generally own no tenancy in the docks. *See e.g.*, *Golden Stevedoring Co.*, 335 NLRB 410 (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).

[5]Private security guards typically work on a client's property, not the property of their immediate employer. Security contractors do not own any "leasehold" over their employees' work space. The transitory nature of this industry gave rise to *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

concessionaires,[7] hotel management contractors,[8] and temporary agencies[9] will have no refuge in any "leasehold." These employers typically have nothing but a contractual license to enter with their employees, and perform services on property.

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continuing collective-bargaining rights. *Burns*, 406 U.S. at 274-279. The same consideration applies to employees' access rights.

[6]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). The janitorial contractor normally has no "leasehold" over its employees' work space or break areas. See, e.g., 300 NLRB at 1154.

[7]The Hotel is not unusual in outsourcing its restaurant services. Workers employed by food service contractors are increasingly requiredto organize at workplaces inside the client's facility. *See, e.g.*, *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); *Lincoln Center for the Performing Arts,* 340 NLRB 1100 (2003).

[8]The hotel industry increasingly separates management and ownership, as when a hotel owner chooses to hire a management company to operate the hotel with an imported complement of employees. Such employees work at the hotel, without actually being employed by the hotel owner. *See, e.g.*, *Mayfield Holiday Inn*, 335 NLRB 38 (2001).

[9]By definition, a temporary agency or "employee leasing" provider does not purchase any leasehold in the client's workplace to which the temporary employee is sent. The temporary employee remains an employee of the temp agency. *See, e.g., Labor Ready, Inc.*, 331 NLRB 1656 (2000).

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 exterior access is what the Board has consistently preserved for off-duty employee activity. *See Ark Las Vegas*, 343 NLRB at 1283-84.

C. If the Board Gives Subcontractor Employees Second-Class Status, the Act will Become a Dead Letter.

1. The Hotel argues for two-tiered NLRA rights.

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.

The 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. *See id.*; *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 incentive for subcontracting. This is so whether the Board defines subcontractor employees as having virtually no rights (as asked by the D.C. Circuit's first question) or simply an arbitrarily reduced set of rights (as per the second question.) In either case, a business like NYNY would have a powerful incentive to insulate its business from on-site union activity by subcontracting some or all of the enterprise. 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 case is only one example of the creative devices that would lend themselves to such an objective: *e.g.*, lease-backs of property, management contracting, or employee leasing. No matter what "balancing" alchemy is employed, any two-tiered system of rights according fewer rights to contractor employees will induce businesses to contract away either property ownership or personnel management, if that maneuver will insulate the enterprise from unwanted union activity.

2. A two-tiered system would impair all Section 7 rights, not merely the right of *Tri-County* access.

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 withdraw its invitation 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). When a property owner invites a contractor to its property, the contractor's employees bring

their NLRA rights with them. *Fabric Services*, 190 NLRB 540, 541-542 (1971).

All of these cases would become obsolete if the Board announced a lesser degree of Section 7 protection for “non-employee” subcontracted workers against property owners like the Hotel.

D. Section 7 is Source of Worker Rights, Not a Set of Employer-Centered Regulations.

This case illustrates a deeper issue in the interpretation of the Act. Employers tend to view the Act as a body of regulations for immediate employers, as though “labor relations” were nothing but a set of legal restraints on personnel management.

This is not what Section 7 is. Section 7 confers generally enforceable rights on workers. It is not merely a set of regulations that apply only to immediate employers.

1. Section 7 rights are enforceable generally.

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). *See* Brief of Amicus Curiae Prof. Ellen Dannin (discussing

legislative history of §§2(3) and (9)). To limit protection "only to employees of a particular employer, would permit employers to discriminate with impunity against other members of the working class, and would serve as a powerful deterrent against free recourse to Board processes." *Briggs Mfg. Co.*, 75 NLRB 569, 570-571 (1947). Section 7 rights may be vindicated outside the immediate employment relationship, even against the government itself. *Livadas v. Bradshaw*, 512 U.S. 107, 133-134 (1994) (union member could vindicate her § 7 rights against state agency.)

2. Property owners must respect Section 7 rights, even if they are not the immediate employer.

The D.C. Circuit's remand in *NYNY* asked whether Supreme Court law supports the enforceability of Section 7 rights against third-party property owners. The short answer is *Hudgens v. NLRB*, 424 U.S. 507, 510 n.3 (1976), where the Court 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.

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).

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 subcontracted operations proliferate in most industries.

E. The Hotel's Property Rights Are No Stronger Against Ark Employees than Against its Own.

The Hotel invites the Board to "balance" its property right so that it outweighs Ark employees' right to engage in Section 7 activity.

1. There is no principled distinction between Ark employee exercise and NYNY employee exercise.

The Hotel offers no principled reason why this balance should be different between Ark employees and NYNY employees. The Hotel's property interest is identical as to both sets of employees.

First, the Hotel has the same right to monitor and control Ark employees as it does its own employees. Pursuant to NYNY's rules, Hotel security issues badges and credentials to Ark workers, just as it does NYNY employees. *See Ark II*, 343 NLRB at 1283; *New York New York*, 334 NLRB at 767. The Hotel has a contractual right to require that Ark employees conform to its rules. GC EX. 5 (15148) §8.9. There is no difference between the two groups of workers for security purposes. If an

Ark worker misbehaves while leafleting off-duty, NYNY has the means to identify and exclude him as readily as it may a NYNY employee.

Furthermore, the fact that NYNY's own employees indisputably enjoy *Tri-County* rights on hotel property means that the property is already subject to this kind of exercise by on-site workers. By choosing to use its property to employ workers in interstate commerce, NYNY has already waived its property right to forbid on-site employee leafletting. The fact that it has chosen to invite a subcontractor to take over part of the enterprise does not change that waiver.

2. The invitation that matters is the Hotel's invitation of Ark, not its invitation of individual Ark workers: *Wolgast* rather than *Gayfers*.

The "invitation" that waives the Hotel's property right is not any specific invitation of individual Ark workers, but the Hotel's voluntary introduction of Ark itself.

The D.C. Circuit's remand in *NYNY* criticized the Board's caselaw in *Gayfers Dept. Store*, 324 NLRB 1246 (1997) and *Southern Services*, 300 NLRB 1154 (1990) *enforced* 954 F.2d 700 (11th Cir. 1992), for identifying subcontractor employees' rights as arising from their status as invitees. 313 F.3d at 588-590. The Court noted that any individual

invitation might well be complicated by the Hotel's restrictions on that invitation, just as the general public is invited to drink and gamble, but not to solicit. *See id.*, 313 F.3d at 590.

Gayfers and *Southern Services* used a confusing analytic shortcut that should be corrected here. In *Gayfers* and *Southern Services*, the Board spoke of the subcontractor employee as if he/she had been individually invited by the property owner. This is not usually accurate, and it creates confusion where the property owner invites the general public as well with a no-solicitation condition.

The relevant invitation is the owner's voluntary introduction of the subcontractor, whom the owner brings on its property with the knowledge that it will employ workers in interstate commerce there. This is what waives the owner's common-law right to prohibit Section 7 exercise – its awareness that it is introducing a subcontractor who will have employees with Section 7 rights surrounding their workplace.

The Board should instead apply the analysis in cases where general contractors object to the entry of union agents to service the employees of their unionized subcontractors. Even though the general contractor itself may have no contract with the union, "by hiring such subcontractors, [the

site owners] thereby 'necessarily submitted their own property rights to whatever activity, lawful and protected by the Act' might be engaged in by [the subcontracted employees' union representatives]. . ." *Wolgast Corp. v. NLRB*, 349 F.3d 250, 254-255 (6th Cir. 2003), *quoting Villa Avila*, 253 NLRB 76, 81 (1980).

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 – just as its own employees' workplace rights supersede its property rights. *CDK Contracting Co*., 308 NLRB 1117, 1117-18 (1992); *Wolgast Corp.*, 334 NLRB 203 (2001) *enfd.* 349 F.3d 250 (6th Cir. 2003).

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.

3. The Hotel's reliance on its common-law right to "condition its invitation" is a circular argument.

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 common-law right to condition access to their property, by inviting workers only to work, but not to hand out leaflets, solicit, or wear union buttons.

It makes no difference that most states like Nevada broadly permit property owners to condition their invitation as they please. This common-law power would allow employers to forbid any unwanted Section 7 exercise, by any employee. But it is Section 7, not state property law, that permits employees to organize on private property. *ITT Industries v. NLRB*, 413 F.3d 64, 72 n.2 (D.C. Cir. 2005), *citing New York New York*, 313 F.3d at 589. 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). 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*. *See also Hillhaven Highland House*, 336 NLRB 646, 648 (2001) *enfd.* 344 F.3d 523, 528-530 (6th Cir. 2003) and *ITT Industries*, 341 NLRB 937 (2004) *enfd.* 413 F.3d 64 (D.C. Cir. 2005). Once it is established that a worker is an on-site employee, it begs the question to label his union activity "trespassing."

IV. The Board May Not Split the Difference By Allowing Some Section 7 Exercise, but Not All.

The Hotel may argue that the Board should split the difference, *e.g.*, by allowing Ark employees to handbill each other on NYNY property, but not to handbill customers.

This makes nonsense of the Hotel's reliance on property rights. If the Hotel has a property right under *Lechmere* to exclude Ark workers as "nonemployees," the Board cannot require it to allow activity aimed at fellow employees. After all, the handbills distributed by the nonemployee union agents in *Lechmere* were directed to employees, not the public. 502 U.S. at 529-530. If Ark workers are "nonemployees" under *Lechmere*, the Hotel as no duty to allow them the right to handbill anybody.

On the other hand, once the Board acknowledges (as it did in *Ark*) that Ark employees do have Section 7 rights in the surrounding hotel areas, then the issue is not whether they distribute leaflets, but only what the leaflets say and to whom the leaflets are offered. This is a matter of managerial concern, not a property issue. At this point, *Stanford Hospital* and *Eastex* control the case.

The Hotel and General Counsel have in the past invoked pre-*Eastex* cases, like ALJ Leff's decision in *Fabric Services*, 190 NLRB 540, 541-542 (1971), for the proposition that customer appeals may be accorded a different "balance" than employee appeals. The short answer to such authority is that it predates *Stanford Hospital*, if not *Eastex*. Once the Board determines that Ark employees may solicit in a given area, there is no longer any principled basis for the Board to discriminate between protected messages and lawful recipients. *Stanford Hospital*, 325 F.3d at 342-345; *Eastex,* 437 U.S. at 563.

V. 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 D.C. Circuit 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 theory.

Second, the Hotel is just complaining about the existing state of NLRA access law. The Hotel's argument is equally a complaint against its own employees' rights to after-shift access. This argument runs against decades of court-approved law. The right of workers to return to exterior non-work areas of their workplace after their shift is a basic feature of NLRA law. 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*).

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. *Hillhaven Highland House*, 336 NLRB at 650. 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 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 at 650.

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.

VI. The Charging Party May Defend the General Counsel's Initial Theory, Despite the General Counsel's Shifting Positions.

Finally, we address a procedural issue raised by the General Counsel's changing positions.

In his May 15, 2003 position statement on remand, the General Counsel appeared to repudiate the theory of the complaint. As of 2003, the General Counsel agreed with the Respondent that Ark employees should be treated as "non-employees" as to New York New York.

In 2004, on remand in *Ark*, the General Counsel returned to his initial position. Without acknowledging his 2003 brief in *NYNY*, the General Counsel argued on the *Ark* remand that Ark employees do have full section 7 rights in the exterior areas of the Hotel.

If the Charging Party were bound by the General Counsel's 2003 position, there would be nothing left to consider in this case. The General Counsel and Respondent could proceed to make Board policy by stipulation. This is not the case presented here. Because the case has proceeded to trial and beyond, the General Counsel's changing position does not bar the Charging Party from defending the complaint accepted by the Board in 2001. "Once adjudication of a case has begun, the decision whether to grant the General Counsel's request to dismiss all or part of the complaint is left to the Board's discretion, and in this case, the Board exercised its discretion and denied the request." *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB No. 14 (2007) at 4 & n.12 (proceeding to rule on complaint allegations defended by the Charging Parties, but disavowed by the General Counsel.)

This applies to theories of the complaint that the General Counsel prevailed on in 2001, but now disavows. As in *Schreiber Foods*, "[a]lthough the General Counsel sought to disavow that position, the Board denied the motion. Thus, the Board held that the position must be addressed on the merits." *Id*. *See also Sheet Metal Workers Local 162*

(Dwight Lang's Enterprises), 314 NLRB 923 n.2 (1994); *Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB 981 (1992).

Here, the General Counsel has made no motion to withdraw any of its original complaint. That complaint turns on the allegation that "the Respondent and ARK Las Vegas Restaurant Corporation, have shared common premises and facilities . . . and otherwise enjoyed a symbiotic relationship with one another, thereby investing the employees of Ark with essentially the same rights and privileges as employees of the Respondent in this case." Complaint in 28-CA-14519 2(e), 28-CA-15148 2(f). Even if the General Counsel's more recent briefs could be taken as such a motion, the Board should deny the motion and permit the Charging Party to litigate the original theory, as in *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB No. 14 (2007) at 4 & n.12.

CONCLUSION

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

October 2, 2007 Respectfully submitted,

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CERTIFICATE OF SERVICE
§ 102.114(i)

I hereby certify that on October 2, 2007, I caused to be served in accordance with the expedited service requirements of Section 102.114(i) with notice to all parties of e-filing, a true copy of the **CHARGING PARTY'S PRE-ARGUMENT BRIEF**, in the manner and addresses described below:

Gary C. Moss DLA PIPER USLLP 3960 Howard Hughes Parkway, Suite 400 Las Vegas, Nevada 89161 PH: 702-737-3433 FAX: 702-737-1612	Employer Via Overnight Delivery
Michael J. Karlson, Regional Attorney National Labor Relations Board Region 28 2600 North Central Avenue, Suite1800 Phoenix, Arizona 85004-3099 PH: 602-640-2160 FAX: 602-640-2178	General Counsel - NLRB Via Overnight Delivery

/s/

Miriam I. Tom,
Assistant to Michael T. Anderson