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

CHARGING PARTY'S RESPONSE TO PRE-ARGUMENT BRIEFS

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

CASES

SUMMARY OF REPLY

The Charging Party agrees with the Respondent ("the Hotel") and the employer *amici* that the Board faces a clear choice. The Board must either deem Ark workers like Ron Isomura to be "non-employees" with no right to solicit anywhere in the Hotel under *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 534 (1992), or it must treat them as "employees" who carry their Section 7 rights with them into the Hotel under *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). The Board may not split the difference through a balancing test.

The General Counsel's defense of Section 7 rights is correct, but within the wrong framework. The nonderivative nature of on-site Ark workers' Section 7 exercise is not a factor in some balancing test under *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 110 (1956); it is the reason why *Babcock* and *Lechmere* do not apply in the first place.

The Employers' underlying objection to the Ark workers' handbilling has nothing to do with a distinction between subcontractor employees and direct employees. The Employers are really complaining that existing *Republic Aviation* rights are too liberal for any employees, direct or contracted. Specifically, the Employers are complaining about the

right of off-duty access (and the right of customer appeals) under *Tri-County Medical Center*, 222 NLRB 1089 (1976). If the Board intends to curtail *Tri-County Medical Center* rights, it should do so openly and uniformly. But the Board should not try to roll back *Tri-County Medical Center* rights piecemeal, using a rationale that would strip subcontractor employees of any Section 7 protection at all.

ARGUMENT ON REPLY

I. The Board Faces a Sharp Choice: Subcontractor Employees Are Either Strangers to Property under *Lechmere* or On-Site Employees under *Republic Aviation.*

A. The Employers Are Correct That There Is No Grey Area After *Lechmere.*

The Hotel and the employer *amici* (collectively, "the Employers") argue that there is no longer any room for balancing tests or intermediate "quasi-employee" classifications after *Lechmere*. Hotel Pre-Hearing Brief at 11-17; Chamber of Commerce Brief at 7; Venetian Brief at 6.

The Union agrees. After *Lechmere*, the Board may not compromise this statutory question through multi-factor balancing tests. Nor may the Board create a disfavored caste of quasi-employees to split the difference.

The issue here is important but simple: are Ark workers strangers to the Hotel property under *Lechmere*, or are they on-site employees entitled to Section 7 exercise under *Republic Aviation*?

To answer this question, the Board must choose whether "employee" status is measured from the worker's perspective (*i.e.*, is Ron Isomura rightfully on the property where he spends his working life?) or from the property owner's perspective (*i.e.*, is the Hotel the immediate employer of Isomura?)

If the former, Isomura has the same *Republic Aviation* rights as the Hotel's own employees. If the latter, he has no rights to solicit anywhere in the Hotel, whether inside or outside the restaurants, whether to customers or to fellow "nonemployee" Ark workers. The Hotel's no-solicitation policy applies throughout the Hotel, including the restaurants, the employee cafeteria and locker rooms. Ark's "lease" over these areas is burdened by the duty to obey the Hotel's rules. So if Ark workers are deemed "non-employees" as to the Hotel, they have no enforceable *Republic Aviation* rights at all.

B. Ark Employees' Nonderivative, On-Site Section 7 Exercise Is Not a Factor in a *Babcock* Balancing Test; It Is the Reason Why *Babcock*/*Lechmere* Do Not Apply in the First Place.

The Union agrees with the General Counsel's defense of Ark workers' rights. General Counsel's Pre-Hearing Brief at 15-23. The General Counsel is clearly right that Ark workers are exercising nonderivative, on-site Section 7 rights at their regular workplace.

However, the General Counsel makes the right arguments in the wrong framework.[1] After *Lechmere*, the fact that Ark workers are exercising their own rights around their own workplace is no longer a factor in some *Babcock* balancing test – it is the reason why *Babcock* and *Lechmere* do not apply in the first place.

1. "Employee" status under Section 7 must be determined from the workers' perspective.

The Employers fixate on the distinction between "employee" and "nonemployee" in *Babcock* and *Lechmere*. The Employers assume, without further analysis, that "employee" status under the Act must be

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[1] As we explain in Part VI of our Opening Pre-Argument Brief, the Charging Party is not bound by the General Counsel's current position where Charging Party is defending the original theory of the complaint. *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB No. 14 (2007) at 4 & n.12.

measured from the owner's perspective, not from the worker's relationship to his/her workplace. But this assumes what the Employers are trying to prove. *Babcock* and *Lechmere* did not deal with the rights of subcontracted workers who work full-time on property. In *Babcock* and *Lechmere*, this issue was never presented: the nonemployees were union organizers who had never worked anywhere on the property, and had never worked for any business operating there.

The Employers seize on the word "nonemployee" in a way that makes nonsense of *Lechmere*. If the Employers' reading of *Lechmere* were correct, not even the employees of the tenant stores inside the Lechmere Mall had a right to handbill on mall property, since they were not the Mall's direct employees. *See Lechmere*, 502 U.S. at 529.

This is not the law. The only Supreme Court case that begins to speak to this issue is *Hudgens v. NLRB*, 424 U.S. 522 (1976). There, the Court held that the pickets who worked for the store tenant (even those from a different location, who had never worked in the mall!) were not the same as the "nonemployees" in *Babcock* – they were not "outsiders" in the same sense. *Hudgens*, 424 U.S. at 522.

The Employers take a schizophrenic approach to *Hudgens*. They embrace *Hudgens* for the proposition that a *Babcock* balancing test applies, Hotel Brief at 12, but then they repudiate *Hudgens* and the ensuing Board decision on remand, *Scott Hudgens*, 230 NLRB 414, 416 (1977) because that case resulted in a holding in favor of the union pickets. On this latter point, the Employers declare that *Lechmere* wiped out *Hudgens*' balancing test and the outcome in *Scott Hudgens*, 230 NLRB at 416. Hotel Brief at 12.

This is not a consistent reading. To the extent that *Lechmere* forces the Board to choose between "employee" and "nonemployee" status, this case is far stronger for the workers than off-site employee cases like *Hudgens*, *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 workers seeking access had never worked on that property, and had no *Republic Aviation* ties to that workplace beyond their employment at a distant location elsewhere.

Prior to *Lechmere*, the balancing test described in *Hudgens* might have supported the General Counsel's current framework. After *Lechmere*, however, the Board must simply decide whether Ron Isomura and others

who work full-time in the Hotel are "employees" in the eyes of the Act. If *Lechmere* deprives Isomura of that status, then any employer can circumvent the Act just by designing the same kind of subcontract that Ark and the Hotel have designed here.

This has never been the law. Section 7 rights have always been defined as rights centered on the worker. Those rights are not merely enforceable against the immediate employer, but against third parties, including property owners, who interfere with them. *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); *Fabric Services*, 190 NLRB 540, 541-542 (1971).

2. Ark workers have *Republic Aviation* rights in and around their workplaces, not necessarily throughout unrelated areas of the Hotel.

The Employers' self-centered analysis also dictates their answer to the D.C. Circuit's question whether Ark employees have *Republic Aviation* rights throughout the Hotel. The Employers assume that if Ark workers are deemed to be the Hotel's employees, Ark workers will thereby have *Republic Aviation* rights to go anywhere in the Hotel, regardless of where they work. Hotel Brief at 38-39.

This is not the case. Ark workers do not claim to be the Hotel's employees: they claim to be "employees" working inside the Hotel. Under normal *Republic Aviation* principles, such workers have the right to solicit in break areas (including the employee cafeteria). They also have the right under *Tri-County Medical Center*, 222 NLRB 1089 (1976) to off-duty access to the exterior areas of the property where they work– the parking lots and public areas of the Hotel surrounding the restaurants.

This is not controversial. Since the *NYNY* remand, the D.C. Circuit and the Board have already held that such rights are both protected and obvious for Ark employees, including the Hotel property outside their workplace. *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). Remarkably, neither the Hotel nor any of the Employer *amici* even mention this parallel *Ark* case. The Board would have to do a direct about-face to accept the Employers' arguments here.

3. The Hotel's "trespass" claim repeats the argument discredited in *Venetian Casino Resort*.

The Employers repeat their circular argument that Nevada property law allows property owners to condition the invitation to their property as they see fit. Hotel Brief at 29, 34; Chamber Brief at 9; Venetian Brief at 8.

This argument would foreclose any "uninvited" *Republic Aviation* activity, even by the Hotel's own employees. At common law, the Hotel has the right to invite workers to enter the property to work, but not to solicit. This was the employers' argument in *Republic Aviation* – their property right entitled them to condition the invitation to work with a non-discriminatory no-solicitation rule. 324 U.S. at 797-798. *Republic Aviation* rights exist only because they supersede common-law trespass law under the Supremacy Clause – the NLRA creates federal rights that displace contrary state-law rights. Nevada law could with equal force be read to define "uninvited" *Republic Aviation* leafleting as actionable trespass, but that law is preempted by the NLRA as a direct interference with § 7 rights. *See Livadas v. Bradshaw*, 512 U.S. 107, 119 n.13 (1994) (where state trespass law deprives parties of NLRA-protected rights, the state policy is preempted). 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.

It is telling that the one individual employer *amicus* here is the Venetian Casino Resort. NYNY is reviving the same property-law

argument that its sister casino the Venetian unsuccessfully made in *Venetian Casino Resort, LLC v. Local Joint Executive Board of Las Vegas*, 257 F.3d 937, 939-948 (9th Cir. 2001) *cert. denied*, 535 U.S. 905 (2002), and *Venetian Casino Resort, LLC,* 345 NLRB No. 82 (2005), *enforced* 484 F.3d 601 (D.C. Cir. 2007).

As in this case, the Venetian contracted to open its private property to people who had federal rights, thereby waiving its private property right to exclude them. *Venetian Casino Resort*, 257 F.3d at 948. The Venetian argued that it had the state-law property right to condition its invitation to allow pedestrians to walk across its property, but not to speak or demonstrate contrary to its no-solicitation rule. *Id*. The Ninth Circuit, followed in turn by the Board and the D.C. Circuit, rejected this argument. When the Venetian opened its property to general thoroughfare traffic, the people on that "private" sidewalk easement brought their First Amendment rights with them, notwithstanding state property law. 257 F.3d at 948 (Ninth Circuit); 345 NLRB No. 82 at 1-2; 484 F.3d at 609 (D.C. Circuit). If the Venetian did not want free speech within its property lines, it could have refrained from agreeing to thoroughfare access to its property.

The same rule applies here. When the New York New York Hotel & Casino brought Ark to do business inside its hotel, it knew that Ark would be employing workers in interstate commerce on that property. Ark's employees therefore brought their Section 7 rights with them, regardless of the Hotel's residual control over the areas surrounding their workplace. *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d at 107-108; *Ark Las Vegas Restaurant Corp.*, 343 NLRB at 1283-84 & ns. 9-11. The Hotel cannot complain that it has been stripped of its property right to prohibit solicitation, because it waived that right by knowingly introducing a business operating in interstate commerce, and thereby 'necessarily submitted their own property rights to whatever activity, lawful and protected by the Act' might be engaged in by [the subcontracted employees]. . ." *Wolgast Corp. v. NLRB*, 349 F.3d 250, 254-255 (6th Cir. 2003), *quoting Villa Avila*, 253 NLRB 76, 81 (1980). These NLRA rights come, not from some conditional individual invitation, but from the fact that Ark workers are employed in interstate commerce covered by the Act.

4. *CDK Contracting* and *Wolgast* provide the better analysis than *Gayfers* and *Southern Services*.

This is why the "individual invitee" analysis of *Gayfers Dept. Store*, 324 NLRB 1246 (1997) and *Southern Services*, 300 NLRB 1154 (1990)

enforced 954 F.2d 700 (11th Cir. 1992) was not satisfactory. *See New York New York*, 313 F.3d at 588-590.

To characterize Ron Isomura as an "invitee" of the Hotel is meaningless if this label does not distinguish him from any other patron subject to the Hotel's no-solicitation rule. The Board should instead follow its analysis in cases where, 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).

This rule does not conflict with *Lechmere*, just as the *Venetian* decisions do not conflict with cases like *Hudgens* that otherwise permit property owners to bar First Amendment exercise. A property owner like the Venetian has no obligation to permit municipal thoroughfare traffic on its property. But when it does contract to allow such a municipal sidewalk, the pedestrians on that sidewalk bring their First Amendment rights with them. For the same reason, when a property owner like NYNY voluntarily introduces economic activity on the property for which federal law dictates

federal rights for the persons employed there, the owner is not in a position to use state property law to nullify those rights. 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.

The reason why Ron Isomura has NLRA rights against the Hotel is not that the Hotel has invited him individually– it is that the Hotel has invited Ark to come on its property to engage in interstate commerce. This is what distinguishes Isomura from a blackjack player.

C. The Employers Do Not Own Up to the Consequences of Their *Lechmere* Argument.

The Employers do not acknowledge that, according to their position, Ark employees have no Section 7 rights anywhere in the Hotel, whether inside or outside the restaurants, and whether they solicit customers or fellow "nonemployees." All areas of the Hotel, and all subjects of solicitation, are subject to the Hotel's rules against "nonemployee solicitation" which are a condition of Ark's supposed lease.

1. The "weakness" or "strength" of the workers' message is immaterial under *Eastex* and *Lechmere*.

Having correctly argued that *Lechmere* precludes a balancing test, the Hotel proceeds to fall back on that very pre-*Lechmere* balancing to

denounce the handbilling here as unprotected because it conveyed an "area standards" message to customers. Hotel Brief at 25-30.

This makes nonsense of the Hotel's prior reliance on *Lechmere*. If the Hotel has a property right under *Lechmere* to forbid "nonemployee solicitation," the Board cannot require it to allow even handbills aimed at fellow Ark workers. After all, the handbills distributed by 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 has no duty to allow them the right to solicit anybody. The Hotel's argument against the "weakness" of such a message contradicts its absolutist argument under *Lechmere*.

If, on the other hand, Ron Isomura is correctly seen as an "employee" under Section 7 rightfully on Hotel property, there is no longer any ground for the Board to discriminate between handbills appealing to employees and handbills appealing to customers. *Stanford Hospital and Clinics v. NLRB*, 325 F.3d 334, 342-345 (D.C. Cir. 2003), *citing Eastex, Inc. v. NLRB*, 437 U.S. 556, 563 (1978). The Hotel's own employees may make both kinds of appeals, as the Hotel indirectly admits. This is so because, once the off-duty handbiller is lawfully present on property, the Hotel's

interest in managing his presence does not vary with the content of the message. *Id*.

The Employers' and General Counsel's citations to pre-*Eastex* cases like *Peddie Buildings*, 203 NLRB 265 (1973) *enf. denied*, 498 F.2d 43 (3d Cir. 1974), which purported to distinguish appeals to customers from appeals to employees, are out of date. After *Eastex* and *Stanford Hospital*, such distinctions can no longer control the protection for *Republic Aviation* exercise by the Hotel's own employees. Once the Board recognizes that Ark workers like Ron Isomura are also "employees" under the Act, there is no further basis for reviving this distinction for them.

2. If the Hotel may bar *Republic Aviation* exercise, the Hotel may bar it anywhere, including restaurants, the employee cafeteria, and locker rooms.

The Hotel does not acknowledge how far its "property rights" argument goes. If Ark employees like Ron Isomura have no *Republic Aviation* rights against the Hotel, they have no right against the Hotel to engage in *Republic Aviation* exercise anywhere, including inside the restaurants or inside the employee cafeteria. While Ark may be prohibited from restricting such exercise, *see Ark Las Vegas Restaurant Corp.*, 343 NLRB at 1284, the whole premise of the Hotel's case is that *it* is not bound

by Ark's NLRA obligations to Ark's employees. So if the Hotel is correct, it may call for trespass arrests against "nonemployee" solicitation by Ark workers anywhere in the Hotel, including the restaurants, the employee cafeteria, the locker rooms or the break area.

The Hotel is not prevented from enforcing its no-solicitation rule by any term of its "lease" contract with Ark. Ark's right to operate inside the restaurants is subject to the Hotel's rules and regulations, including its no-solicitation rule. The lease gives NYNY the power to promulgate rules of Ark employee conduct inside 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. Unlike a commercial lease, Ark has no exclusionary right to oust the Hotel for the duration of the lease term. 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. As the ALJ in *Ark Las Vegas* explained: "Whatever the 'lease' may say, [Ark] is better described as the food service concessionaire for NY-NY." *Ark Las Vegas*, 335 NLRB at 1287.

At trial, the Hotel's manager Dennis Shipley was adamant that, in the Hotel's view, Ark's workers are non-employees, and non-employee solicitation "anywhere" on hotel property is contrary to Hotel rules. Tr. 40-41 (Case 14519). If the Board accepts the Hotel's argument here, Mr. Shipley will not have to stop at the restaurant walls in banning Ark workers from soliciting.

3. Ark employees work full-time in the Hotel.

For the first time in this case, the Hotel questions the ALJs' findings that Ark's employees work "regularly and exclusively" inside the Hotel. Hotel Pre-Hearing Brief at 39. This belated argument is meritless.

Both ALJ Nelson and ALJ Metz made this finding on the record. *New York New York Hotel*, 334 NLRB 762, 769 (2001) (Case No. 28-CA-14519) and *New York New York Hotel*, 334 NLRB 772, 776 (2001) (Case No. 28-CA-15148). The Hotel failed to except to Judge Nelson's factual statement in Case No. 28-CA-14519. *See* Respondent's Exceptions in Case No. 28-CA-14519. This waives any factual objection. *See* Rules & Regs. §§102.46(a) and 102.48(a). In Case No. 28-CA-15148, the Hotel did not contest this point in its exceptions brief. *See* Respondent's Brief in

Support of Exceptions in Case No. 28-CA-15148. This waives the point. *Can-Am Plumbing, Inc*. 350 NLRB No. 75 ns. 18-19 (2007).

There is a reason why the Hotel has not raised this argument before. The record shows that Ark's employees work "regularly and exclusively" inside the New York New York Hotel. Ark's Employee Handbook reflects that its employees work at the New York New York Hotel only, and that the Hotel dictates many of the rules contained in its Handbook:

> We would like to welcome you to Ark Las Vegas Restaurant Corp., referred to as Ark Las Vegas, and all of the properties we manage at New York-New York Hotel & Casino . . . Please keep in mind that many of the policies stated in our handbook are in part the result of our tenancy at the New York-New York Hotel and Casino.

G.C. Ex. 7 (Case 14519). Furthermore, the parallel Board decision in *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284 (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*, 343 NLRB 1281 (2004), shows that Ark employees at NYNY are hired specifically to work inside the Hotel, and do in fact work full-time at the Hotel.[2] *See* 335 NLRB at 1287 (Ark hired employees to work inside hotel), 1292 (Ron Isomura),

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[2]Both the Board and the D.C. Circuit read the record in *Ark* and *New York New York* together. 334 F.3d at 110; 343 NLRB at 1282.

1293 (Thomasson), 1293-94 (Spears), 1294 (Lopez), 1295 (Manuel), 1297 (Ariaza), 1298 (Aguilar and Schafer), 1300 (Durham), Trude (1301), 1302 (Serna), 1303 (Carillo), 1305 (Cruz and Hernandez), 1306 (Jordan).

II. The Employers Are Really Attacking *Tri-County Medical Center*.

The Employers' complaint about off-duty workers handbilling on their property does not really turn on any distinction between Ark workers and other workers in the Hotel. The Employers' property-rights argument is really that no on-site employee ought to have this access as part of his/her *Republic Aviation* rights. In other words, the Employers are really making a disguised attack on *Tri-County Medical Center*, 222 NLRB 1089 (1976) itself.

A. There Is No Material Difference Between the Hotel's Power to Regulate its Own Employees' Off-Duty Activity and its Power to Regulate Ark Employees' Off-Duty Activity.

In order to explain why off-duty Ark employees are somehow more of a threat than off-duty NYNY employees, the Hotel tries to argue that it has less power to identify and control off-duty Ark employees that it does its own employees.

This is utter nonsense. Pursuant to NYNY's rules, the Hotel issues badges and credentials to Ark workers, just as it does to NYNY employees.

See Ark II, 343 NLRB at 1283; *New York New York*, 334 NLRB at 767. Ark employees must carry I.D. cards titled "New York New York, Ark Las Vegas." Tr. 61 (Case 14519). These I.D. cards are required for checking into work at the Hotel. *Id.*, Tr. 62. When Hotel security confronted the Ark worker-handbillers, the Ark workers presented these I.D. cards. Tr. 63 (14519). The Hotel has a contractual right to require that Ark employees conform to its rules. GC Ex. 5 (15148) §8.9. If an Ark employee misbehaves while off-duty, he or she can be identified, and the Hotel can require that the offending worker be disciplined or barred pursuant to §8.9 of the Agreement. The Hotel already invites Ark workers back to the Hotel for all other purposes. *Ark Las Vegas Restaurant Corp.*, 334 F.3d at 107-108; 343 NLRB 1281 at 1283-84.

There is therefore no difference between the two groups of workers for purposes of Hotel security's ability to identify, control, and manage them. The Hotel's suggestion that its contractor's employees can run wild inside the Hotel is simply frivolous.

B. If the Board Considers Overruling *Tri-County Medical Center*, It Should Do So Openly.

The Employers' property-rights objection would extend equally to off-duty employees of the Hotel. Off-duty employee handbilling of

customers in the Hotel's public areas raises the same issues whether the employee's I.D. card identifies him as an Ark or NYNY employee. If the Employers believe that this is an unwarranted extension of Section 7, they have a defense under existing law. *Republic Aviation* already gives employers the defense to show that, in a given case, special circumstances grounded in valid "business reasons" may justify a restriction on solicitation rights. *Tri-County Medical Center*, 222 NLRB at 1089. While the D.C. Circuit and the Board have already rejected such a defense here, *Ark Las Vegas Restaurant Corp.*, 334 F.3d at 107-108; 343 NLRB at 1283-84, the Employers are free to urge that this decision be overruled.

If the Board wishes to reconsider *Tri-County Medical Center*, it should do so in a case where the parties have a full opportunity to address it. But it should not overrule *Tri-County Medical Center* piecemeal, by using an overbroad rationale that obliterates any *Republic Aviation* protection for contractor employees at all.

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CONCLUSION

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

October 16, 2007

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CERTIFICATE OF SERVICE
§ 102.114(i)

I hereby certify that on the October 16, 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 RESPONSE TO PRE-ARGUMENT BRIEFS**, in the manner and addresses described below:

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