UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK NEW YORK, LLC, d/b/a NEW YORK NEW YORK HOTEL & CASINO,
RESPONDENT,

v.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 and BARTENDERS UNION, LOCAL 165,
CHARGING PARTY.

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

RESPONDENT NEW YORK NEW YORK LLC'S d/b/a NEW YORK NEW YORK HOTEL AND CASINO'S STATEMENT OF POSITION ON REMAND

Gary C. Moss
PIPER RUDNICK, LLP
3960 Howard Hughes Parkway, Suite 400
Las Vegas, Nevada 89109
(702) 737-3433
(702) 737-1612 (telecopier)

Celeste M. Wasielewski
PIPER RUDNICK, LLP
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 861-3982
(202) 223-2085 (telecopier)

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK NEW YORK, LLC d/b/a NEW YORK NEW YORK HOTEL & CASINO, Respondent, and LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 AND BARTENDERS UNION, LOCAL 165, a/w HERE, AFL-CIO, Charging Party.	)	**Case Nos. 28-CA-14519 & 28-CA-15148**

RESPONDENT NEW YORK NEW YORK LLC'S
STATEMENT OF POSITION ON REMAND

I. INTRODUCTION

On December 24, 2002, the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit," the "Court of Appeals" or the "Court") issued a decision granting Respondent New York New York, LLC, d/b/a New York New York Hotel & Casino's ("New York New York," "NYNY," "Company," "the hotel/casino," or "Respondent") petitions for review, denying the National Labor Relations Board's ("NLRB" or "Board") applications for enforcement, and remanding the cases to the Board for further proceedings. *See New York New York, LLC v. National Labor Relations Board*, 313 F.3d 585 (D.C. Cir. 2002). On April 2, 2003, the Board advised the parties that it had accepted remand of the cases and invited them to submit position statements on or before April 16, 2003. The time for filing position statements was extended to May 1, 2003, at the request of Respondent. Thereafter, the Board granted the request

by the Regional Director of Region 28 for an additional extension of time, until May 16, 2003. Pursuant to the foregoing, Respondent New York New York LLC hereby submits its Statement of Position on Remand.

II. QUESTIONS ON REMAND

In denying enforcement to the NLRB's orders in the above-captioned cases, the D.C. Circuit determined that the underlying decisions upon which the orders were based "leave[ ] a number of questions ... unanswered." *New York New York*, 313 F.3d at 590. The Court went on to direct the Board to now answer those questions in reevaluating its earlier decisions. *See id.* The Court articulated the questions as follows:

> Without more, does the fact that the Ark employees work on NYNY's premises give them *Republic Aviation* rights throughout all of the non-work areas of the hotel and casino? Or are the Ark employees invitees of some sort but with rights inferior to those of NYNY's employees? Or should they be considered the same as nonemployees when they distribute literature on NYNY's premises outside of Ark's leasehold? Does it matter that the Ark employees here had returned to NYNY after their shifts had ended and thus might be considered guests, as NYNY argues? 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)? *Compare United Food & Commercial Workers*, 74 F.3d at 298. (Derivative access rights, the Supreme Court has held, stem "entirely from on-site employees' § 7 organization right to receive union-related information." *ITT Industries*, 251 F.3d at 997.)

Id.

The Court then defined broad guidelines that the Board should follow in answering these questions:

> It is up to the Board to answer these questions and others, not only by applying whatever principles it can derive from the Supreme Court's decisions, but also by considering the policy implications of any accommodation between the § 7 rights of Ark's

employees and the rights of NYNY to control the use of its premises, and to manage its business and property.

Id.

These questions and issues are discussed below.[1]

III. DISCUSSION

A. Controlling Supreme Court Authority Compels The Board To Conclude That Ark Employees Do Not Have The Same Rights To Engage In Section 7 Activities On New York New York's Private Property As Do New York New York Employees And That The Board Should Have Applied The *Babcock & Wilcox* Standards In Evaluating The Conduct Of The Ark Employees.

As noted above, the D.C. Circuit directed the Board to apply the principles enunciated in several relevant Supreme Court decisions in reevaluating its earlier decisions. Those principles compel the Board to conclude that its earlier determinations that off-duty Ark employees have the same legal rights to engage in activities under Section 7 of the National Labor Relations Act as amended ("NLRA" or the "Act") on NYNY property as do the employees of NYNY were

---

[1] NYNY has previously submitted briefs in support of its contentions in both of the earlier proceedings before the Board. In submitting this statement of position, Respondent assumes that the Board, as part of its re-evaluation of its earlier decisions, will review those briefs. Most of the issues raised by the D.C. Circuit in its decision remanding the case to the Board are discussed in those briefs. These briefs are therefore incorporated herein by reference. Copies of the opening and reply briefs submitted by NYNY to the Court of Appeals, which also discuss the issues, are attached hereto as Exhibits A and B, respectively.

Before the Board and the D. C. Circuit, Respondent also contended that even if the off-duty Ark employees did have the right to distribute handbills on NYNY property under *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), they did not have the right to distribute in the particular areas of the hotel/casino involved here because substantial evidence establishes that those areas are work areas for NYNY employees, and the prohibition at issue here was necessary to maintain production and plant discipline in those areas. Because of the determination it made, the D. C. Circuit did not address those issues in its decision, and they are not currently before the Board on remand. However, in submitting this position statement and limiting it to the issues set forth by the Court, Respondent is in no way abandoning or waiving these other contentions or conceding the correctness of the Board's determinations with respect to them.

erroneous, and that the *Babcock & Wilcox*[2] standard should be applied in evaluating the conduct of the off-duty Ark employees.

1. Under controlling Supreme Court authority, only individuals who have an employment relationship with a property owner have *Republic Aviation* rights to engage in Section 7 activities on that property.

In both of its earlier decisions in these cases, the Board concluded that the off-duty Ark employees had the same rights of access to NYNY's private property to engage in Section 7 activity as did employees of NYNY. As such, according to the decisions, the conduct of these individuals should be evaluated under the standards set forth in *Republic Aviation*. However, the D. C. Circuit's opinion expressed considerable doubt as to the validity of those conclusions, primarily because the Board's decisions appear to ignore, or at least misinterpret, controlling Supreme Court authority holding that the right of access to private property to engage in Section 7 activity derives from an employment relationship with the property owner. If there is not an employment relationship, the rights of the non-employee to enter the property must be evaluated under the criteria established in *Babcock & Wilcox*.

The Court expressed this view several times in its opinion. For example, the Court stated: "In recognition of the property rights of employers and the § 7 rights of employees to organize, the Supreme Court has drawn a distinction between employees and non-employees." *New York New York*, 313 F.3d at 587 (citation omitted).

At another point in the opinion, the Court referenced one Supreme Court decision that is particularly important to reevaluating these cases, *Hudgens v. NLRB*, 424 U.S. 507 (1976). *See*

---

[2] *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956).

New York New York, 313 F.3d at 587-88. In discussing the Supreme Court's treatment in that case of the issue involved here, the D.C. Circuit observed:

> Highlighting the difference between the rights of employees and nonemployees, the Court explained in a later case that a "wholly different balance [is] struck when the organizational activity [is] carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests [are] there involved.

Id. Implicit in the quotation from *Hudgens,* especially in its use of the phrase "management interests," as well as the D.C. Circuit's interpretation of the decision, is that the right of an individual to come onto another's private property to engage in Section 7 activity is premised upon the fact that the individual is employed by the property owner.

Even more to the point, the D.C. Circuit then observed:

> . . . the Court's most recent pronouncement in [*Lechmere*] reaffirmed the principle announced in *Babcock & Wilcox* that the National Labor Relations Act confers rights upon employees, not nonemployees, and that employers may restrict nonemployees' organizing activities on employer property.

Id. at 588 (citations omitted).

And, in discussing the Board's reliance upon *MBI Acquisition Corp. d/b/a Gayfers Dept. Store*, 324 N.L.R.B. 1246 (1997) ("*Gayfars*") and *Southern Servs., Inc.*, 300 N.L.R.B. 1154 (1990), *enf'd* 954 F.2d 700 (11th Cir. 1992) ("*Southern Services*"), the Court stated that:

> Neither Board decision takes account of the principle reaffirmed in *Lechmere* that the scope of § 7 rights depends on one's status as an employee or nonemployee.

New York New York, 313 F.3d at 588.

Finally, in criticizing the Eleventh Circuit Court of Appeals' decision in enforcing the Board's order in *Southern Services*, in which the Eleventh Circuit had concluded that an

employee of a contractor of the Coca-Cola Company was not trespassing when she distributed literature to co-workers on Coca-Cola's property, the Court stated:

> But that is the very point of *Lechmere*, as we explained in *ITT Industries*: the § 7 rights of employees entitle them to engage in organization activities on company premises. Nonemployees do not have comparable rights. The Seventh Circuit case *Southern* cited – *Montgomery Ward* – is no longer good law. On its facts it was nearly identical to *Lechmere*, yet it held that nonemployees could enter a store and distribute union literature to employees in violation of the employer's rule against it – just the opposite of what the Supreme Court later held in *Lechmere*.

Id. at 589 (citations omitted).

From the above, it is clear that the D. C. Circuit believes the Supreme Court's decisions in *Republic Aviation, supra*, *NLRB v. Babcock & Wilcox*, *supra*, *Hudgens, supra,* and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992)[3] establish that the extent, if any, of an individual's right of access to private property for the purpose of engaging in purported Section 7 activity depends upon whether there is an employment relationship between the private property owner and the individual seeking access. Where such a relationship exists, the *Republic Aviation* standard applies; in the absence of an employment relationship, the *Babcock & Wilcox/Lechmere* test controls. In these cases, the relevant inquiry, then, is not whether the individuals are "rightfully on the property" or perform their jobs "regularly and exclusively" on the property, as the Board expressed in its initial decisions, but whether the individuals were employees of NYNY. Thus, the Board's earlier decisions were erroneous in that regard.

---

[3] These cases and other controlling authorities were analyzed in Respondent's Opening Brief to the D.C. Circuit Court at pages 15-28, which is attached hereto as Exhibit A and incorporated herein by reference, and on pages 12-18 and 24-28 of Respondent's Briefs in Support of Exceptions to the Decision of the Administrative Law Judge in Case No. 28-CA-14519 and Case No. 28-CA-15148, respectively.

There is no doubt that the individuals who were engaging in the handbilling in question here were not employees of NYNY. As such, they were "nonemployees," within the literal meaning of that term as it has been used by the Supreme Court in its decisions. It logically follows, then, that those individuals did not have the right to come onto the private property of NYNY and distribute handbills to that company's customers and guests regarding the wages paid by their own employer, unless they satisfied the *Babcock & Wilcox/Lechmere* standards. Since they did not, New York New York did not violate Section 8(a)(1) of the Act when it precluded them from engaging in such activity on its private property.

2. The Board has previously applied the "employment relationship" standard in at least two cases involving the rights of individuals to engage in Section 7 activity on private property and should do so here.

The Board has in at least two other cases involving the rights of individuals to engage in Section 7 activity on private property applied the analysis articulated in the Supreme Court authority discussed above. It should now do so in these cases.

The first such case was *Scott Hudgens*, 230 N.L.R.B. 414 (1977). There, striking employees were denied access to a mall which housed several retail establishments, including one operated by their employer. The Board, although finding that under the circumstances of that case the denial of access did violate the Act, analyzed the access issue under the *Babcock & Wilcox* standard. More specifically, in its reconsideration of the case on remand from the Supreme Court and the Fifth Circuit, the Board did not evaluate whether the mall owner properly banned distribution activities for purposes of "plant discipline and production" – the *Republic Aviation* analysis. Rather, since there was no employment relationship with the mall owner, the Board applied the *Babcock & Wilcox* standard and considered whether the picketers had

reasonable alternative means of communicating their message. The same standard should apply in these closely analogous cases now before the Board on remand.

The Board also utilized the employment relationship analysis in a recent case which was decided before the instant cases, but which was not mentioned in the decisions. In *Hillhaven Highland House*, 336 N.L.R.B. No. 62 (Sept. 30, 2001) ("*Hillhaven*"), the Board stressed that in determining the extent, if any, of access rights to private property for Section 7 purposes, the existence of an employment relationship between the individual seeking access and the property owner is an extremely important element in the analysis. *Hillhaven* involved access rights of off-site employees. The Board decided that the offsite employees involved in that case did, indeed, have non-derivative Section 7 access rights to other facilities of their employer. According to the Board:

> [o]ffsite employees are not only "employees" within the broad scope of Section 2(3) of the Act, they are "employees" in the narrow sense: "employees of a particular employer" (in the Act's words), that is, employees of the employer who would exclude them from its property. ***Clearly, then, these workers are different in important respects from persons who themselves have no employment relationship with the particular employer.***

Hillhaven, 336 NLRB No. 62, slip op. at 4 (emphasis added). The employer had argued that the offsite employees were "strangers" to the location where they did not work and, thus, had no right of access. The Board rejected this contention, reasoning:

> [o]f critical importance ... is the fact that an employment relationship exists between [offsite employees] and the employer, which distinguishes offsite employees from the ordinary trespasser, who is truly a stranger. The existence of an employment relationship, in turn, means that the employer has a lawful means of exercising control over the offsite employees (even regarded as trespasser), independent of its property rights. Surely it is easier for an employer to regulate the conduct of an employee – as a legal and a practical matter – than it is for an employer to control a

> complete stranger's infringement on its property interests. The employer, after all, controls the employee's livelihood.

Id. at 6.

The analysis undertaken in *Hudgens* and *Hillhaven* would plainly have required a different result had it been applied to the cases on remand. Inexplicably, it was not. In neither of these cases did the off-duty Ark employees who came into the work areas of NYNY's private property have an employment relationship with NYNY. In the absence of such a relationship, there existed no means for NYNY to regulate or control the infringement on its private property other than through reliance on state trespass laws. For example, a valid NYNY rule denying its own employees access to the interior of the hotel would have been of little use to NYNY in these circumstances, since the Company would have been unable to enforce the rule against the off-duty Ark employees. Indeed, the Company would lack *any* means to ensure compliance with the rule. In the absence of the ability to regulate the conduct of the Ark employees, it is clear from *Hudgens* and *Hillhaven* that the Ark employees who are not NYNY employees are not entitled to exercise *Republic Aviation* rights throughout the NYNY premises.

3. The Board's reliance on *Gayfers* and *Southern Services* in its earlier decisions was erroneous.

In denying enforcement of the Board's orders, the Court found that the Board's reliance on *Gayfers* and *Southern Services* in its previous decisions was not sufficient to explain its reasoning for reaching the conclusions it did in these cases. In that regard, the Court explained that neither *Southern Services* nor *Gayfers* adequately addressed the balancing of private property rights and Section 7 rights, which is the fundamental consideration in cases such as these.

The decisions in both of those cases focused on where and when the employees worked, and the propriety of their being on the private property at issue, rather than on the relationship

between the individuals and the private property owners. In neither decision did the Board explain why the factors relied upon justified a finding that the employees had the same Section 7 rights as did the employees of the owners of these properties, or how these factors were significant in accommodating the competing Section 7 and property rights involved.

The inherent error in both *Gayfers* and *Southern Services*, in light of the Supreme Court's findings that "nonemployees" do not have Section 7 rights, is that in both cases, the Board equated the access rights of the contractor's employees to those of the employees of the property owner without pointing to any legal basis for doing so. Without so stating, but apparently in order to avoid application of *Babcock & Wilcox* and *Lechmere*, the *Gayfers* Board focused on whether the contractor's employees were "rightfully on the property" of the mall owner. According to the Board, "[b]ecause [the] employees ... work exclusively and regularly at Gayfers (footnote omitted), they were not 'strangers' to the [r]espondent's property, but rightfully on it pursuant to their employment relationship." *Gayfers*, 324 N.L.R.B. at 1250. Determining that the handbillers were thus not "trespassers," the Board went on to apply the *Republic Aviation* standard in analyzing the conduct of the handbillers.

In reaching its conclusions, the Board presumptively reasoned that because the individuals who were engaging in the handbilling activities were employees of someone (the contractors), and because they were on the worksite as a result of that employment, they were "employees" for purposes of Section 7 and thus had the same rights they would have had if they were employed by the property owner. However, the Board offered no explanation as to how these factors somehow created an employment relationship between the property owner and the contractor's employees, which must be found to exist in order for there to be *Republic Aviation* rights, or at least offer some other rationale as to why the handbillers had the same rights as

employees of the property owner. There is good reason for the Board's failing in this regard – an employment relationship did not exist and there was no other valid legal theory upon which the Board could have relied.

Southern Services is also factually distinguishable from the cases now before the Board on remand.[4] In *Southern Services*, an employee of Southern Services, Inc., ("SSI"), a company providing janitorial services to Coca-Cola, distributed organizational handbills to co-workers on Coca-Cola's property as she and her fellow employees were reporting for work. Coca-Cola maintained a "no solicitation/no distribution rule" applicable to nonemployees at the facility and directed the individual to cease handbilling on its property. In the ensuing NLRB proceedings, the administrative law judge ("ALJ" or "judge") applied *Babcock & Wilcox* and *Jean Country*[5] and determined that the complaint should be dismissed because the General Counsel failed to show that the SSI employees had no other reasonable means of communication.

The Board disagreed with the ALJ's analysis, applied *Republic Aviation,* and found that SSI and Coca-Cola had failed to show that the distribution of handbills in non-working areas on non-working time was necessary to maintain production and discipline at the complex. The Board did not consider whether the case should have been decided under *Babcock & Wilcox*. To the contrary, the Board assumed away any such consideration by concluding that the SSI

---

[4] It is true that the Board's decision in *Southern Services* was enforced by the Eleventh Circuit. 954 F.2d 700 (11th Cir. 1992). However, it is important to note that the D.C. Circuit sharply criticized the Eleventh Circuit decision. In that regard, the Court observed in *ITT Industries, Inc. v. NLRB*, 251 F.3d 995 (D.C. Cir. 2001) and repeated in its decision here that the Eleventh Circuit's decision is "unpersuasive," having been decided after *Lechmere* issued, but without so much as mentioning the case. *See New York New York*, 313 F.3d at 589.

[5] 291 NLRB 11 (1988).

employees were properly on the Coca-Cola property as a result of the contractual relationship between the companies.

Those facts are far different from those involved here. First, the handbiller was distributing organizational materials to her co-workers – not customers of Coca-Cola, the property owner. Here, the intended targets of the leafleting were not Ark employees, but rather visitors to NYNY who passed through the porte cochere doors or walked by the entrances to the America and Gonzales y Gonzales ("Gonzales") restaurants. Moreover, unlike the leaflets in *Southern Services*, the leaflets here had an area standards, rather than organizational, purpose.

Second, the handbilling in *Southern Services* took place at the entrance used by the SSI employees to enter the Coca Cola premises, and the SSI employee distributed the handbills while coming into work. In stark contrast, the Ark employees who engaged in handbilling were not on their way to work, were not on a break or meal period, and had not just completed their shifts. They returned to NYNY on their scheduled days off and went to public areas inside and outside of the hotel/casino for the express purpose of handbilling the hotel/casino's customers and guests. Thus, the Ark employees were not on the premises "pursuant to their employment relationship" with Ark. In addition, as discussed *infra*, the handbilling was not intended to reach Ark employees. The targeted audience included NYNY guests and customers. Indeed, the handbilling was done in public areas precisely because customers and guests would be present, rather than the Ark employee entrances and employee parking lots where only other employees would be present.

It is thus clear that *Gayfers* and *Southern Services* do not resolve the issues before the Board on remand and the Board should not rely upon those cases in reevaluating its earlier decisions. Neither case adequately explains how or why the rights of employees of a lessee are

the same – or even greater – than the rights of employees of the lessor. Simply being on private property pursuant to an employment relationship with someone connected to the property is not enough. The situs of the work location does not control. The nature of the employment relationship governs this issue. In order for the off-duty Ark employees to have *Republic Aviation* rights throughout the non-work areas of the hotel and casino, they must, according to *Lechmere* and the other Supreme Court authority discussed above, be employed by the private property owner. Since they were not, their rights cannot be found to be as broad as the rights of NYNY employees. Consequently, the Board must conclude that NYNY did not violate Section 8(a)(1) of the Act when it precluded the Ark employees from handbilling on its private property.

4. Off-duty employees of Ark should not have the right to engage in area standards handbilling which is directed at customers and guests of NYNY on NYNY's private property.

Another of the questions posed by the Court of Appeals concerned the consequences, if any, of the fact that when they were removed from the premises, the off-duty Ark employees were not engaged in organizational activities directed at their fellow employees. The nature of the off-duty Ark employees' activities and the intended audiences are clearly factors that must be considered by the Board in fulfilling its obligation to balance any Section 7 rights the Ark employees might have and NYNY's private property rights. According to the Supreme Court:

> The *Babcock & Wilcox* opinion established the basic objective under the Act: accommodation of § 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other." The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context.

Hudgens, 424 U.S. at 522. Here, the Board's initial decisions gave no deference to NYNY's rights to own and control its private property and manage its business. Instead, the Board found

that off-duty employees of a lessee had the right to come into public areas in and around the hotel/casino at times and places of their choosing to encounter customers and guests of NYNY to inform them that the employees do not believe their own employer pays them wages and benefits comparable to other employees in Las Vegas. There is no rational basis for the findings that those rights completely obviate the private property rights of NYNY and as such, they are completely inconsistent with the balancing of interests and accommodation of rights required by the Supreme Court.

It is an undisputed fact in these cases that the off-duty Ark employees were not engaged in organizational activities in the porte cochere and the aisleways in front of America or Gonzales. Ark employees did not seek to communicate with their co-workers; they did not station themselves near employee entrances or in employee parking lots in an effort to relay an organizational message to their colleagues; and they did not engage in organizational handbilling in Ark employee break rooms, locker rooms, or designated eating areas. In fact, the record is devoid of any attempts by the off-duty Ark employees to reach their co-workers.

Rather than Section 7 organizational activities, the off-duty Ark employees were engaged in area standards handbilling. Further, there is no evidence that the off-duty Ark employees targeted only customers of Ark to spread their message. The handbilling in the porte cochere of NYNY was directed at any individuals using the hotel/casino's main entrance, regardless of whether the patrons and guests intended to dine at Ark-operated food service facilities. Likewise, the handbilling at the entrances to America and Gonzales was not directed only at persons seeking access to the restaurants; the handbills were distributed to all individuals passing by the restaurants. In other words, nonemployees of NYNY were attempting to exercise rights in a non-organizational context on NYNY's private property. These are critical factors in analyzing

whether NYNY violated the Act in prohibiting those individuals from engaging in handbilling on its private property.

In assessing the relative strength of Section 7 activities, the D.C. Circuit has observed that non-employee area standards activity is a weaker right than that of non-employee organizational activity, and under such circumstances, "it makes sense that the *Babcock* rule reaffirmed in *Lechmere* would apply with no less force in the context of area standards or consumer boycott activities." *United Food and Commercial Workers v. National Labor Relations Board*, 74 F.3d 292, 298 (D.C. Cir. 1996). According to the D. C. Circuit:

> Supreme Court precedent clearly establishes that, as against the private property interest of an employer, union activities directed at consumers represent weaker interests under the NLRA than activities directed at organizing employees. A long history of cases manifests a hierarchy among Section 7 rights, with organizational rights asserted by a particular employer's own employees being the strongest, the interest of nonemployees in organizing an employer's employees being somewhat weaker, and the interest of uninvited visitors in undertaking area standards activity, or otherwise attempting to communicate with an employer's customers, being weaker still. Thus, "under the § 7 hierarchy of protected activity imposed by the Supreme Court," nonemployee activity in which "the targeted audience was not [an employer's] employees but its customers" "warrants even *less* protection than non-employee organizational activity." *NLRB v. Great Scot, Inc.*, 39 F.3d 678, 682 (6th Cir. 1994).

United Food and Commercial Workers, 74 F.3d at 298 (emphasis in original).

Here is it clear that the "strongest" of the Section 7 rights is not at issue. The Ark employees were not attempting to communicate with other Ark employees about organizing a union. The next strongest right in the hierarchy is also not implicated because the handbillers were not "non-employees" of Ark who were attempting to organize the Ark employees. Finally, the activities of the Ark employees do not even fall squarely within the ambit of the "weakest" of

the Section 7 rights. While they certainly were not "invited visitors" to NYNY under these circumstances, they were attempting to communicate, at least in part, with customers and guests of a business other than their own employer. At best then, the Ark employees were exercising an even weaker right than the right the D. C. Circuit has characterized as the weakest of Section 7 rights.

In contrast, the Ark employees were severely infringing on the right of New York New York to control access to its private property, control the conduct of invitees to that property, manage its business, and establish the ambience of that business. In short, the rights of the Ark employees are far outweighed by the rights of New York New York and there is no way for the Board to accommodate the right of the Ark employees to engage in such conduct without seriously infringing upon the property rights of New York New York. Accordingly, the Company's action in prohibiting the handbilling cannot be found to have violated the Act.

This is especially true in light of the fact that there has been no showing, or even an effort to show, that the Ark employees could not convey their area standards message to the same intended recipients by other, less intrusive means than were utilized here, such as handbilling on public property near the entrances and exits of the property or through the media. Therefore, in balancing the Section 7 rights and property rights in these cases, the Board should conclude that the rights of the Ark employees did not include the right to engage in handbilling directed at customers and guests of NYNY on the private property of NYNY.

B. Ark Employees Have No Greater Access Rights to the Areas of New York New York's Premises Involved In This Case than Other Invitees To the Premises And Their Conduct Exceeded The Scope Of Their Invitation.

The D. C. Circuit stated that another of the questions the Board should answer in its review of its earlier decisions is whether it matters that Ark employees returned to NYNY after

their shifts had ended and as such, whether they might be considered guests. New York New York submits that it matters very much. The fact that the Ark employees were off duty at the time of their handbilling activities and that they were present at the hotel/casino as guests requires the Board to find that NYNY did not violate Section 8(a)(1) of the Act in prohibiting their conduct.

There is no question that the Ark employees were off duty and that they were not employees of NYNY. However, there is some basis for a finding that they were invitees to the premises because NYNY had a policy in effect that allowed off-duty employees of its lessees to return to NYNY to engage in gaming, attend entertainment events, and dine in the restaurants. This is similar to the invitation by NYNY to the general public, except that the Ark employees may not be in their Ark uniforms when visiting the hotel/casino and they may not patronize the bar areas in NYNY.

However, there is no justification for finding that the Ark employees have any greater rights as invitees than those of any other invitee to the premises, merely because they were engaged in area standard handbilling. As the Court noted, New York New York has a policy that prohibits any outsiders, including invitees, from distributing literature or engaging in solicitation on the premises. *See New York New York*, 313 F.3d at 586. When the off-duty Ark employees began distributing literature to patrons and guests of NYNY after they had come onto the premises, they exceeded the scope of their invitation and NYNY was well within its legal rights to enforce its no solicitation/no distribution rule.

The law on this point is clear. *See* RESTATEMENT OF TORTS (Second) § 168 (1965) (A conditional or restricted consent to enter land creates a privilege to do so only insofar as the condition or restriction was complied with.); RESTATEMENT OF TORTS (Second) § 169 (1965)

("A consent given by a possessor of land to the actor's presence on the land during a specified period of time does not create a privilege to enter or remain on any other part"); and RESTATEMENT OF TORTS (Second) § 170 (1965) ("A consent given by the possessor of land to the actor's presence on the land during a specified period of time does not create a privilege to enter or remain on the land at any other time."). Importantly, Nevada law is entirely consistent with these principles. *See e.g., S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243, 247 (Nev. 2001) ("A party is privileged to use another's land only to the extent expressly allowed by the easement . . . Any misuse of the land or deviation from the intended use of the land is a trespass for which the owner may seek relief."). Consequently, the off-duty Ark employees lost their status as "invitees" and became "trespassers" when they began distributing leaflets on NYNY's private property in violation of the Company's policy. *See New York New York*, 313 F.3d at 589 (in discussing *Southern Services,* the D.C. Circuit observed that "[w]hile the actions of the subcontractor's employee may not have fit within the ancient tort of trespass *quare clausum fregit*, her violation of the company's no solicitation rule nonetheless made her a trespasser.") As trespassers, the hotel/casino remained free to enforce its no solicitation/no distribution rule and prohibit the handbilling on its private property.

C. Policy Considerations Compel The Board To Conclude That New York New York Did Not Violate The Act When It Denied Off Duty Ark Employees Access To The Areas Of The Premises Involved In This Case.

As noted above, the D.C. Circuit indicated that in hearing these cases on remand, the Board should consider the policy implications of any accommodation between the Section 7 rights of Ark's employees and the right of NYNY to control the use of its premises and to manage its business and property.

In doing so, it is important that the Board keep in mind the issues that are before it in these cases. Specifically, the Board is required only to decide whether NYNY violated the Act when it caused employees of a lessee to be removed from the premises when, on their off duty time, they came to areas of the hotel/casino in which they did not work and to which they did not have access as a result of their job duties, and distributed area standards literature indiscriminately to any customer or guest of NYNY who happened to be in the area. It is the policy implications relating to the accommodation of the competing rights involved in this fact scenario that the Board must consider.

It is the position of NYNY that the Board's initial decisions and the precedent upon which those decisions were based did not give due consideration to the Company's private property rights when the Board initially found that it had violated the Act. It simply is not consistent with the public policy of the United States to find that an owner of property on which that owner conducts an on-going business must cede his constitutional rights to control who has access to that property and to control the conduct of those who it invites to the property, because the owner has also exercised his lawful right to enter into a lease with another party pursuant to which that party will engage in certain of its own business activities on that property.

It cannot be disputed that the ability to control the conduct of invitees of a business such as a hotel/casino is vital to the success of that business. *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (*quoting Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)) ("The right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property.") Individuals who attempt to encounter guests who have come to NYNY to engage in leisure activities and to embroil those guests in a dispute with some other employer clearly pose a potential threat to NYNY's business interests. Not allowing the property

owner to protect those interests severely impedes the constitutional right to own and use property. These are strong policy considerations in favor of NYNY's position in these cases.

On the other side of the coin, the negative policy considerations of a finding that NYNY could prohibit the conduct involved here are relatively minor. In reality, the impact on the statutory rights of the Ark employees is minimal. As discussed above, these employees were not attempting to communicate with their fellow employees to encourage them to join in their union organizing effort. While they may have a right to engage in area standards handbilling, the D.C. Circuit has made clear its view that this right is far less significant than other Section 7 rights. That is especially so in this case, where the area standards message related to an employer other than NYNY and where the conduct involved was not done in such a manner as to minimize the impact on NYNY's property rights. Moreover, the Ark employees have ample alternative means to convey their message in other equally or more effective ways, such as doing the handbilling on public sidewalks surrounding NYNY or using print and/or visual media. Thus, a Board decision that NYNY did not violate the Act in prohibiting this conduct will not obliterate this statutory Section 7 right, but simply restrict that right in order to accommodate and preserve a competing constitutional right. Prohibiting that handbilling which was done here is far less offensive to the public policies inherent in the Act than a contrary decision would be to the basic right to own and use private property as the owner sees fit, and the bedrock legal principles that are the underpinnings of the Supreme Court decisions in *Lechmere* and the cases which proceeded it.

Counsel for the General Counsel and the Charging Party presumably will assert similar policy arguments that they made to the D.C. Circuit – that a Board finding in favor of NYNY could have far-reaching consequences with respect to the exercise of other Section 7 rights for employees such as the Ark employees and employees in other industries. These arguments are

not persuasive for a number of reasons. First, they assume that rights granted to employees under Section 7 of the NLRA are always superior to and supercede the constitutional rights of property owners. As Respondent has demonstrated, that is not the case. Secondly, these arguments assume that the Board can ignore the fact that it must base its decisions in law, and can ignore Supreme Court precedent and engage in what amounts to legislative action because it believes adverse consequences would result to employees and unions by its decision. The Board has no such authority.

Finally, the argument assumes that a finding in these cases that NYNY did not violate the Act necessarily means that all other Section 7 rights will be undermined. As discussed above, these cases involve one set of facts, and it is to these facts that the Board must apply the law. There may well be other facts and other cases where the outcome might be different. Those cases will be resolved when they arise. As the Court of Appeals observed, the fact that NYNY and Ark have entered into a lease pursuant to which Ark employees perform their job duties on NYNY's premises may have some significance with respect to the exercise of other Section 7 rights. Indeed, NYNY is not contending in these cases that Ark employees do not have the right to engage in activities protected by Section 7 on its property. It asserts only that the Ark employees did not have the right to engage in the conduct involved here for which they were removed from the property. Whether the Ark employees have the right to engage in other Section 7 activities at other locations on the NYNY premises will be decided on another day if and when those issues arise.

IV. CONCLUSION

For the reasons set forth above and in Respondent's prior pleadings to the Court of Appeals and Board, the standard in *Babcock & Wilcox*, as affirmed in *Lechmere*, controls the

cases on remand because the workers at issue were not employed by Respondent. Further, even if the involved individuals did have limited access rights to NYNY's private property by virtue of their employment relationship with Ark, they clearly exceeded the scope of their invitation by engaging in distribution in areas other than those leased to Ark in violation of NYNY's no solicitation/distribution rule. Finally, the area standards activities directed at NYNY patrons and guests must give way to the greater right of NYNY to control its private property. Consequently, the Complaints in the instant cases should be dismissed in their entirety.

Respectfully submitted,

PIPER RUDNICK, LLP

Celeste Wasielewski

Celeste M. Wasielewski
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 861-3982
(202) 223-2085 (telecopier)

Gary C. Moss
3960 Howard Hughes Parkway
Suite 400
Las Vegas, Nevada 89109
(702) 737-3433
(702) 737-1612 (telecopier)

Attorneys for Respondent

Dated: May 16, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent New York New York Hotel & Casino's Exceptions Statement of Position on Remand was sent *via* Federal Express to:

Nathan W. Albright
National Labor Relations Board
600 Las Vegas Boulevard South
Suite 400
Las Vegas, NV 89101-6637

Richard G. McCracken, Esq.
McCracken, Stemerman, Bowen & Holsberry
1630 South Commerce Street - Suite A-1
Las Vegas, Nevada 89102

George R. Murphy
Davis, Cowell & Bowe, LLP
1155 15th Street, N.W. – Suite 405
Washington, D.C. 20005

Celeste Wasielewski

Celeste M. Wasielewski

Dated: May 16, 2003

SCHEDULED FOR ORAL ARGUMENT
THURSDAY, OCTOBER 17, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEW YORK NEW YORK, LLC, d/b/a NEW YORK NEW YORK HOTEL & CASINO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent,

and

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 and BARTENDERS UNION, LOCAL 165,
Intervenor.

Consolidated Cases No. 01-1351 & 01-1352

ON PETITION FOR REVIEW OF THE DECISIONS AND ORDERS OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS-APPLICATION FOR ENFORCEMENT OF THE DECISIONS AND ORDERS

BRIEF OF PETITIONER NEW YORK NEW YORK, LLC, d/b/a NEW YORK NEW YORK HOTEL & CASINO

Gary C. Moss
Verner, Liipfert, Bernhard,
McPherson and Hand, Chartered
3960 Howard Hughes Parkway, Suite 400
Las Vegas, Nevada 89109
(702) 737-3433
(702) 737-1612 (telecopier)

Celeste M. Wasielewski
Verner, Liipfert, Bernhard,
McPherson and Hand, Chartered
901 15th Street, N.W.
Washington, D.C. 20005
(202) 371-6000
(202) 371-6279 (telecopier)

Attorneys for Petitioner

EXHIBIT A

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, Petitioner New York New York, LLC, d/b/a New York New York Hotel & Casino submits the following Certificate of Counsel.

A. ***Parties and Amici:*** National Labor Relations Board (Respondent), New York New York LLC d/b/a New York New York Hotel & Casino (Petitioner) and Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165 (Intervenor).

B. ***Rulings Under Review:*** *New York New York LLC d/b/a New York New York Hotel & Casino and Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO,* 334 N.L.R.B. No. 87 (Case No. 28-CA-14519) entered on July 25, 2001 ("*New York New York I*"), and *New York New York Hotel LLC d/b/a New York New York Hotel & Casino and Culinary Workers Union, Local 226, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO,* 334 N.L.R.B. No. 89 (Case No. 28-CA-15148) entered on July 25, 2001 ("*New York New York II*").

//

//

//

//

C. *Related Cases:* *New York New York I* and *New York New York II* are related cases as they involve the same parties and the same or similar issues. *New York New York I* and *New York New York II* were consolidated by this Court on October 26, 2001. The consolidated cases were not previously before this Court or any other court.

Respectfully submitted,

VERNER, LIIPFERT, BERNHARD,
MCPHERSON & HAND, CHARTERED

Gary C. Moss
3960 Howard Hughes Parkway
Suite 400
Las Vegas, Nevada 89109
(702) 737-3433
(702) 737-1612 (telecopier)

Celeste M. Wasielewski
901 15th Street, N.W.
Washington, D.C. 20005
(202) 371-6000
(202) 371-6279 (telecopier)

Attorneys for Petitioner

Dated: June 18, 2002

CORPORATE DISCLOSURE STATEMENT

In accord with Circuit Rule 26.1, Petitioner New York New York LLC d/b/a New York New York Hotel & Casino makes the following disclosures: Petitioner is a wholly-owned subsidiary of MGM MIRAGE. Petitioner does not issue debt or equity securities to the public. Petitioner does not have any subsidiaries issuing shares or debt securities to the public. Petitioner is engaged in the hotel, gaming and entertainment industry.

Respectfully submitted,

VERNER, LIIPFERT, BERNHARD,
MCPHERSON & HAND, CHARTERED

Gary C. Moss
3960 Howard Hughes Parkway
Suite 400
Las Vegas, Nevada 89109
(702) 737-3433
(702) 737-1612 (telecopier)

Celeste M. Wasielewski
901 15th Street, N.W.
Washington, D.C. 20005
(202) 371-6000
(202) 371-6279 (telecopier)

Attorneys for Petitioner

Dated: June 18, 2002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

---

* Authorities upon which we chiefly rely are marked with asterisks.

Other Authorities

GLOSSARY

"ALJ" OR "Judge" means administrative law judge.

"NLRA" or "Act" means the National Labor Relations Act, 29 U.S.C. §§ 151, *et. seq.*

"NLRB," "Board," or "Respondent" means Respondent National Labor Relations Board.

"New York New York," "NYNY," "Company," "the hotel/casino," or "Petitioner" means Petitioner New York New York, LLC, d/b/a New York New York Hotel & Casino.

"*New York New York I*" means *New York New York LLC d/b/a New York New York Hotel & Casino and Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO,* 334 N.L.R.B. No. 87 (Case No. 28-CA-14519) entered on July 25, 2001.

"*New York New York II*" means *New York New York Hotel LLC d/b/a New York New York Hotel & Casino and Culinary Workers Union, Local 226, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO,* 334 N.L.R.B. No. 89 (Case No. 28-CA-15148) entered on July 25, 2001.

"ULP" means unfair labor practice.

"Union" or "Intervenor" means Intervenor Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an action for review of the Board's Decisions and Orders in *New York New York LLC d/b/a New York New York Hotel & Casino and Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO,* 334 N.L.R.B. No. 87 (Case No. 28-CA-14519) entered on July 25, 2001, and *New York New York Hotel LLC d/b/a New York New York Hotel & Casino and Culinary Workers Union, Local 226, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO,* 334 N.L.R.B. No. 89 (Case No. 28-CA-15148) entered on July 25, 2001. Petitions for Review were filed on August 15, 2001. This Court consolidated the cases by way of order filed on October 26, 2001. This Court is vested with jurisdiction pursuant to 29 U.S.C. § 160(f) (2001).

STATEMENT OF THE ISSUES

1. Whether off-duty employees of a lessee of a private property owner have free-standing, non-derivative rights of access to that property under Section 7 of the Act in order to distribute literature to customers and guests of the property owner in support of the employees' union organizing attempt.

2. Whether the Board's finding that the areas at Petitioner's facility where handbilling occurred are not work areas is supported by substantial evidence.

3. Whether the Board's finding that Petitioner failed to show that the prohibition on handbilling at the locations at Petitioner's facility involved in these cases was necessary to maintain production and discipline is supported by substantial evidence.

STATUTES AND REGULATIONS

29 U.S.C. § 157 (2001):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) [29 USC § 158(a)(3) (2001)].

29 U.S.C. § 158:

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

A. *New York New York I.*

On July 11, 1997, the Union filed an unfair labor practice charge with Region 28 of the NLRB alleging that the Company violated § 8(a)(1) of the NLRA when it precluded off-duty employees of a lessee from engaging in handbilling at the NYNY porte cochere (a main entrance to the building). [App. 361.][1] A complaint issued and was subsequently amended on September 10, 1997. [App. 366-371, 385-391.] The Company's timely answer denied any unlawful conduct and raised certain affirmative defenses. [App. 380-384, 392-396.] On February 11, 1998, a hearing was held before Administrative Law Judge Timothy D. Nelson. [App. 400-401.] Judge Nelson issued his decision on June 29, 1998, in which he found that the Company had violated the Act as charged in the amended complaint. [App. 5-10.] Exceptions were filed with the Board on July 27, 1998. [App. 11-19.]

B. *New York New York II.*

On April 20, 1998, the Union filed a ULP charge with Region 28 contending that the Company violated § 8(a)(1) of the NLRA when it precluded off-duty employees of the same lessee from engaging in handbilling at the porte cochere and at certain locations in the interior of the hotel/casino. [App. 165.] A complaint issued on July 29, 1998. [App. 169-175.] The Company's timely answer denied any unlawful conduct and raised certain affirmative defenses. [App. 176-181.] On December 17, 1998, a hearing was held before Administrative Law Judge Albert A. Metz. [App. 501, n.1.] A decision issued on April 9, 1999, in which Judge Metz

---

[1] "App." references are to the Joint Appendix filed and served herewith.

found that the Company had violated the Act. [App. 501-504.] Exceptions were filed with the Board on May 7, 1999. [App. 505-513.]

On July 25, 2001, the Board issued decisions in both *New York New York I* and *New York New York II*. [App. 1-5, 497-501.] In the former, the Board affirmed the ALJ's findings and conclusions that the lessee's employees were entitled to engage in handbilling activities in the porte cochere; the porte cochere was a non-work area; and that the Company had failed to show its handbilling prohibition was necessary to maintain production and discipline. [App. 1-5.] In *New York New York II*, the Board affirmed the ALJ's findings and conclusions that the lessee's employees were entitled to engage in handbilling activities in the porte cochere and at certain areas in the interior of the Company's private property; the porte cochere and the interior areas at issue were not work areas; and that the Company had failed to show its handbilling prohibition was necessary to maintain production and discipline. [App. 497-501.]

II. STATEMENT OF FACTS

Petitioner operates a large hotel and casino on the "Strip" in Las Vegas, Nevada. [App. 6, 328-329.] The hotel/casino includes a number of restaurants and food service outlets. NYNY does not operate the food service facilities; rather, it has entered into agreements with other companies to perform this function. [App. 7, 256.] One of these companies is Ark Las Vegas Restaurant Corporation ("Ark"). [*Id.*] Ark operates, *inter alia*, the America and Gonzales y Gonzales ("Gonzales") restaurants as well as the Village Streets, a food court. [7, 256-258] All persons working in these food service operations are employed solely by Ark. [*Id.*]

Prior to its opening on January 3, 1997, NYNY voluntarily recognized the Union as the collective bargaining representative of certain of its employees. [App. 7, 354-356, 436-489.]

Ark does not have a collective bargaining relationship with the Union, although the Union has been attempting to organize Ark workers for sometime. [App. 358.]

A. The July 9, 1997 Handbilling.

Ark employees Edward Ramis, John Ensign and Ron Isomura were not assigned to work on July 9, 1997. [App. 267-268, 291-292.] Shortly before noon, the three appeared at the porte cochere of NYNY and began distributing handbills that had been prepared by the Union. [App. 7, 267-268, 277, 291-292, 431.] The porte cochere is on property privately owned by NYNY. [App. 295, 431, 495-496.] All three Ark employees positioned themselves about six feet from the doors leading into the hotel/casino. [App. 269, 291-292, 431.] None of the employees were wearing their Ark uniforms or Ark identification badges. [App. 7-8, 278-281, 291-292.]

The three distributed handbills to individuals entering and leaving NYNY through the porte cochere entrance. [App. 7-8, 260, 271.] The handbillers also spoke to a number of these individuals, sometimes for as long as two minutes. [App. 7-8, 271.] At some point, a NYNY security supervisor advised each of the three that they were trespassing on the Company's private property and asked them to leave. [App. 8, 260-261, 271.] This action was taken pursuant to a NYNY policy which prohibits nonemployees of NYNY from distributing literature on the Company's private property. [App. 261.] When the handbillers refused to depart, the Las Vegas Metropolitan Police Department ("Metro") was called to the facility and issued trespass citations. [App. 8, 261-262, 273, 291-292.]

During the handbilling, a large number of individuals paraded on an adjacent public sidewalk approximately 200 feet away carrying signs that read, in part: "Unfair. Ark Restaurants at the New York New York have no contract with the Culinary and Bartenders Union." [App. 282-283, 286-292.]

B. The Handbilling On April 7 And 9, 1998.

On April 7, 1998, off-duty Ark employees Donald Goodman, John Ensign, Donald Estes and Daniel Malero entered the hotel/casino, which is privately owned by NYNY, in order to engage in handbilling activities. [App. 182-184.] Goodman and Ensign stationed themselves immediately outside the entrance to America restaurant and distributed pamphlets to customers entering and exiting the restaurant and to other persons passing near the entrance. [App. 182.] Estes and Malero stood outside the entrance to Gonzales restaurant and engaged in similar activities. [App. 183.]

NYNY security officers advised the Ark employees that they were not permitted to distribute handbills on NYNY property and that they were trespassing. [App. 182-183.] When the Ark employees refused to leave the premises, Metro officers were again contacted and the officers issued trespassing citations to the individuals. [*Id.*]

On April 9, 1998, off-duty Ark employees Goodman and Antonio Ramirez appeared at the porte cochere entrance of NYNY and distributed handbills in a manner similar to that which had occurred on July 9, 1997. [App. 183.] Metro officers were summoned and the two Ark employees were cited for trespass when they refused to leave. [App. 183.]

C. Activities In The Porte Cochere.

The porte cochere is one of the busiest and most congested areas on the NYNY premises. It includes six traffic lanes to accommodate the high volume of vehicular traffic occasioned by the thousands of individuals who visit NYNY daily. [App. 6, 295-296, 326-327, 431.] Immediately adjacent to the traffic lanes is a walkway, which is directly in front of nine sets of double doors that lead into the hotel/casino. [App. 431.] A portion of the walkway is cordoned

off for guests to wait for taxis. [App. 6, 431.] Some 60 feet from the doors is a valet pick-up area, where guests congregate to wait for their vehicles to be delivered. [App. 312.]

Three separate classifications of NYNY employees are regularly assigned to work in the porte cochere on a 24-hour a day basis – doormen, valet attendants and baggage handlers. [App. 6-7, 326-332, 342.] Two doormen are assigned to the sidewalk area in front of the doors. [App. 331.] They direct traffic in the porte cochere, hail cabs for guests, receive incoming limousines and taxis and answer questions for guests. [*Id.*]

Valet attendants are responsible for parking and retrieving guests' vehicles. [App. 327.] They spend their shift literally running from car to car in the porte cochere and between the porte cochere and an underground parking garage. [App. 327-329, 336-337.] The number of valet attendants per shift depends on the day of the week, time of year, and whether there are special events at NYNY. However, on weekdays, the swing shift is usually staffed with 12 to 14 attendants; 16 to 18 on the weekends; and close to 20 for special events. [App. 328-329.]

Baggage handlers are stationed in a five-foot area separating the lanes of traffic. They load into, and unload baggage from, guests vehicles. [App. 329, 431.] The baggage handlers use brass carts to transport luggage to and from the hotel. [App. 329-330.] The number of baggage handlers on duty varies. For example, swing shift is typically staffed with six to eight handlers, but there may be as many as 10 employees working on Friday nights. [*Id.*]

Bellmen also perform duties in that area, moving baggage into and out of the hotel. [App. 326, 331-332.] Day shift is usually staffed with 12 to 16 bellmen; swing shift 10 to 12; and grave shift typically has four. [App. 332.]

Certain other classifications of NYNY employees spend a portion of their shift working in the porte cochere. For example, Property Operations employees come to this area to perform

scheduled and unscheduled maintenance and other projects. [App. 7, 297-304, 431.] Environmental Services ("EVS") employees likewise spend a portion of their shift in the porte cochere performing cleaning duties. [App. 7, 316-319.] Security officers are frequently in the porte cochere because security and safety-related incidents occur in that area. [App. 7, 342-345.] Specifically, there have been instances where thieves have snatched buckets of coins from inside the casino and were pursued through the porte cochere. [App. 7, 345.] There have also been arguments between taxi drivers and passengers, and encounters between NYNY security officers and inebriated guests. [App. 7, 346-348.] There have been a number of auto accidents in this area. [App. 7, 345-346.] On several occasions, ambulances have used the porte cochere in responding to medical emergencies at the facility. [App. 7, 349.] The porte cochere is also utilized for armored car pick-ups and deliveries. [App. 334.]

Other activities also regularly occur in the porte cochere. For example, airport shuttles pick up and deliver passengers to the porte cochere area approximately every 15 minutes. [App. 332.] The Company leases several limousines that transport passengers to and from NYNY through this entrance. [App. 333-334.] There are numerous deliveries made through this area, including flowers, newspapers, and luggage for tour groups. [App. 334.]

Guests of NYNY arriving either by car or on foot can enter the hotel/casino through several other vehicular and pedestrian entrances in addition to the porte cochere. [App. 52-54, 67-68, 306-307.]

D. Activities Inside NYNY's Facility Where Handbilling Occurred.

1. America Restaurant.

America restaurant is located immediately adjacent to the hotel's front desk. [App. 495-496.] Next to the entrance to America is Il Fornaio, a coffee and pastry shop. [*Id.*] Beyond Il Fornaio are elevators leading to the Century Tower. [*Id.*] A few feet from the elevators is the employee entrance, which NYNY employees use to access the main floor of the hotel from a lower level. [*Id.*] To the right of this employee entrance are escalators leading to NYNY's arcade, roller coaster attraction and parking garage. [*Id.*]

Several job classifications of NYNY employees work in the areas immediately in front of and adjacent to the entrance to America. [App. 503.] Many of these employees are involved in the hotel/casino's gaming operations. For example, a row of slot machines abuts the "Rockefeller Building" approximately 27 feet directly across from the America entrance.[2] Additional machines are located to the right of these, and encircling the Rockefeller Building. [App. 151, 495-496.] Change persons from the Slot Operations department regularly circulate throughout the area, making change for the customers playing the gaming machines, witnessing gaming machine jackpot payouts and verifying that slot machines are filled properly by slot floor persons. [App. 155-56.]

Slot floor persons also regularly perform their duties in the area by the America entrance. [App. 152.] These employees fill gaming machines with coins, pay out jackpots, perform minor machine repairs, and monitor all activities that take place in the area. [App. 152-153.]

---

[2] The Rockefeller Building is a structure on the casino floor that houses a service bar and public restrooms. [App. 71, 495-496.]

Similarly, slot technicians work in the vicinity of the entrance to America. [App. 153-154.] They are responsible for making major slot machine repairs on the casino floor, and for "slot moves," which involve placing new types of games on the floor, removing old ones or redesigning and reorganizing an entire zone of machines. [App. 154.] Slot moves are a regular occurrence at NYNY and can take anywhere from a few hours up to one week to complete. [App. 154-155.]

Two booth cashiers, who exchange coins for paper currency for customers, are assigned to work in fixed locations in the gaming area near the entrance to America. [App. 156.] They also provide currency to the floor persons and supervisors to pay jackpots and do hopper fills. [*Id.*]

Another type of gaming activity offered by NYNY is Keno, and employees from that department perform certain of their duties inside America restaurant. In doing so, they continuously enter and depart the restaurant through this entrance. [App. 495-496.]

Employees involved in other aspects of NYNY's operations work in or about this area. For example, the Company maintains two separate sections of house telephones on the Rockefeller Building directly across from the America entrance that are serviced once each week by NYNY employees. [App. 91-92.]

Immediately to the left of the America entrance is NYNY's business center and mail and information window. [App. 109, 113-114, 495-496.] To access the business center, NYNY customers must walk by the entrance to America. [App. 495-496.] The business center is staffed by two front desk employees and a supervisor. [App. 110.] The business center receives about 10 to 15 patrons per hour, but is much busier at certain other times. [App. 111.]

Attendants working at the mail and information window handle room changes and rent cellular phones when the business center is closed. [App. 113.] Guests also leave mail at that location, which is picked up twice each day by an employee from NYNY's mailroom. [App. 113-114.] This location is also where handicapped guests check in and out of the hotel. [App. 113.] Like the business center, guests using the mail and information window pass by the America entrance to reach that facility. The mail and information window is open seven days per week and is usually staffed on day shift by two or three employees, on swing shift by one or two employees, and on grave shift by one employee. [App. 115.]

The area in front of the America restaurant is maintained by employees who are assigned to the EVS Department and classified as attendants, specialists, and casino porters. These employees are responsible for the cleaning and upkeep of the interior and exterior of NYNY. [App. 123-124, 314-315.] Six employees per shift are assigned to this area. [App. 125.] EVS attendants pan sweep or dust mop the tile floor immediately in front of America on an hourly basis. [App. 126-128.] They also clean the slot machines, pan sweep, and vacuum the carpet in the gaming area across from the America entrance. [App. 132.] Casino porters frequently empty trash receptacles and respond to calls regarding broken glass, spills and other incidents. [App. 125, 128-131.] The EVS specialists, like the attendants and porters, have cleaning duties in the area in the immediate proximity of the entrance to America. [App. 133-137, 144, 495-496.]

Near the America entrance is a portable bar that typically is open from 9:00 a.m. until 1:00 a.m. [App. 76-77, 495-496.] The hotel operates only two such bars, and this particular location was chosen because it is a very "high traffic" area. [App. 77.] One bartender per shift is assigned to the bar. [App. 78.] A bar back and a bar porter assist the bartender. [*Id.*] There are

no seats at the bar, so customers frequently stand in the area near the bar consuming their drinks. [*Id.*]

The portable bar is some 27 feet from the nearest row of slot machines. [App. 495-496.] Patrons playing these slot machines, as well as those that surround the Rockefeller Building, are regularly served complimentary beverages by cocktail servers. [App. 75.] One cocktail server per shift is assigned to the location. [App. 76.]

NYNY maintenance personnel have occasion to perform scheduled as well as unscheduled maintenance and repairs in the area near the entrance to America. [App. 159-161.] One NYNY security officer is assigned to rove the area at all times. [*Id.*]

There are also a substantial number of NYNY personnel who, though not assigned to the area in front of the America entrance, must pass directly in front of the entrance while performing their duties. For example, bellmen regularly traverse the America entrance pulling large luggage carts when taking luggage to and from hotel rooms. [App. 81-82, 85-86.] If a guest is staying in a room located in either the Century, New Yorker or Chrysler Towers, a bellman must pass by the entrance to America to reach the bank of elevators that service each of these Towers.[3] [App. 81-83.] Of the 2,033 rooms in the hotel, 1,793 are located in these three towers. [App. 82-83.]

The average hotel occupancy rate for 1998 was about 94 percent. [App. 84-85.] NYNY has up to 900 guest check-ins and check-outs during the week and some 1,300 check-ins and check-outs on the weekends. [App. 84.] Approximately 70 percent of NYNY guests utilize the services of the bell staff. [App. 85.] In addition, during a 24-hour period, bellmen make up to 20 to 30 deliveries to guest rooms of such items as flowers, dry cleaning, and packages. [App. 86.]

---

[3] A fourth tower, the Empire Tower, is located near the bell desk. [App. 83.]

2. Gonzales Restaurant and the Village Streets.

The other interior location where handbilling occurred was the entrance to Gonzales, a restaurant located in the Village Streets food court. [App. 495-496.] The same job classifications of NYNY employees discussed above work near the entrance to Gonzales, and in or around the Village Streets, performing the same job duties. [App. 155-158, 495-496.] However, slot technicians have the additional task of setting up machines for slot tournaments in this area. [App. 95, 154-155.] The tournaments are held two to three times each month and typically last about three days. [App. 95-96.] The slot machines are brought from other areas of the casino, set up in the aisleways of the Village Streets, and placed back-to-back to form a bank of machines. [App. 95.] The aisleways are thus transformed into temporary gaming areas, and all of the employee activities that occur on the casino floor take place there during the tournaments. [App. 95-96.]

The Slot Operations department has its office within Village Streets. [App. 157-158, 495-496.] Except for booth cashiers, all Slot Operations employees clock in and out, and pick up radios and keys at the slot office. [*Id.*] The employees proceed to their work locations by passing down the aisleway in front of Gonzales and cutting through the gaming area next to Gonzales, or by using another aisleway through the Village Streets. [App. 158.]

EVS attendants perform cleaning duties in the Village Streets similar to those performed near the entrance to America. [App. 138-145.]

Bellmen, baggage handlers and front desk employees likewise perform job duties within the Village Streets. This is occasioned by the fact that an entrance to the hotel/casino utilized by tour bus companies is located in this area. [App. 97, 495-496.] When buses arrive, bellmen and baggage handlers are dispatched from the bell desk. [App. 96-98.] They travel past the America

Restaurant and through the Village Streets to reach the tour bus entrance. [App. 96-97.] Once there, they unload luggage from the buses and deliver it to the guests' rooms. [App. 97-98.] Front desk employees follow the same route to come to this area to register guests arriving by tour bus. [App. 97-98.] The guest registration and luggage handling process can last up to two hours. [App. 97-99.] When these employees are finished servicing the tour bus arrivals, they return to their primary work locations.

3. The areas where the handbilling occurred also serve as aisles and passageways.

The areas in front of America and Gonzales also serve as aisles and passageways for other NYNY employees on their way to or from their work stations, as well as for guests and visitors to the hotel/casino. [App. 503.] The double-door employee entryway located near America's entrance is utilized on a 24-hour a day basis by front desk employees, bellmen, valet parkers, doormen, retail shop employees, casino employees, EVS personnel, bartenders, cocktail waitresses, bar backs, and all the other employees who work on the main floor of the hotel to travel to their work locations. [App. 68-69, 108-109, 150-151.] The employee entrance is also used by these employees during the course of their work day to access the employee dining room, employee restrooms, the human resources office, the accounting department, housekeeping, property operations, room reservations, and the wardrobe room, all of which are located on the hotel's lower level. [App. 68-69, 100-101, 117-118.]

Front desk employees must pass directly by America's entrance in order to reach their work location. [App. 116.] There are 18 work stations at the front desk where the employees

check guests in and out of the hotel, and handle a variety of customer-related issues.[4] [App. 109, 111-112.] Other job classifications of NYNY employees, such as warehousemen, bellmen, mailroom employees, and housekeeping employees have occasion to report to the front desk in performing their duties and in so doing, will walk directly by America's entrance. [App. 88-91.]

The area in front of the front desk functions as NYNY's lobby, and as such, there is a significant amount of customer activity in that location. [App. 112-113.] This activity spills over to the front of America. [App. 102, 112-113, 121-122.] Moreover, guests to NYNY use the aisleway in front of America to reach the escalator which leads to the arcade, roller coaster and parking garage. [App. 55, 87.] The rollercoaster is a much-visited attraction, drawing about 3,000 riders on weekdays and approximately 6,000 on the weekends. [App. 87-88.]

There are several hotel facilities located above the main floor, including conference rooms, hotel sales, a health spa, beauty shop, and men's salon, that are serviced by the Tower elevators. [App. 86.]

SUMMARY OF ARGUMENT

The cases on appeal present the question of whether the employees of a lessee have access rights to the private property of the lessor for the purpose of engaging in Section 7 activity relating to their employment. In deciding that the employees of the lessee had such rights, the NLRB applied the standard set forth in *Republic Aviation v. NLRB*, 324 U.S. 793 (1945) in both cases and ruled that NYNY had violated the NLRA by prohibiting these individuals from

---

[4] Front desk employees are also responsible for emptying the express check-out drop boxes, which are located in each of the four elevator bank lobbies. [App. 114-115.] To access the boxes in the Century, New Yorker and Chrysler Tower elevator lobbies, the front desk employees must pass the entrance to America, and proceed to the elevator lobbies. [App. 495-496.]

handbilling at its porte cochere entrance and at certain locations inside its facility. NYNY contends that the Board erred in applying the *Republic Aviation* analysis because the individuals engaged in handbilling were not its employees and thus had no free-standing rights under Section 7 of the Act to access the areas of the privately owned hotel/casino which were involved in this case.

Assuming *arguendo* the Board did not err in applying *Republic Aviation*, the Board's finding that the locations where the handbilling occurred are not work areas where NYNY could lawfully prohibit handbilling is not supported by substantial evidence. The Board further erred in finding that the handbilling prohibition was not necessary to maintain "production" and "discipline" in these areas.

ARGUMENT

I. NEW YORK NEW YORK DID NOT VIOLATE § 8(a)(1) OF THE ACT WHEN IT PROHIBITED HANDBILLING ON ITS PRIVATE PROPERTY BY INDIVIDUALS WHO WERE NOT ITS EMPLOYEES.

This Court does not sit to "merely rubberstamp NLRB decisions." *Avecor v. NLRB*, 931 F.2d 924, 928 (D.C. Cir. 1991). *See also, Peoples Gas Sys., Inc. v. NLRB*, 629 F.2d 35, 42 (D.C. Cir. 1980) ("[T]his court is a reviewing court and does not function simply as the Board's enforcement arm."). A Board decision will be overturned where the Board "has acted arbitrarily or otherwise erred in applying established law to the facts, or when its findings of fact are not supported by 'substantial evidence' in the record considered as a whole." *Conagra, Inc. v. NLRB*, 117 F.3d 1435, 1438 (D.C. Cir. 1997) (citations omitted). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement ... that courts consider the whole record." *Sullivan Industries v.*

NLRB, 957 F.2d 890, 894 (D.C. Cir. 1992) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

This Court has recognized that Board decisions interpreting ambiguous provisions of the NLRA are entitled to judicial deference. *See, ITT Industries, Inc. v. National Labor Relations Board*, 251 F.3d 995, 999 (D.C. Cir. 2001). However, before this Court will enforce such a decision, it must first determine whether the NLRB's interpretation is "consistent with the underlying statutory scheme" from a substantive standpoint, and whether the Board has analyzed the issue "in a detailed and reasoned fashion." *Id.* at 1004 (citations omitted).

A. The Board Erred In Applying the *Republic Aviation* Standard In These Cases.

1. The controlling law.

The primary issue in these cases is whether NYNY violated the NLRA when it prohibited off-duty employees of one of its lessees from engaging in handbilling activities on its private property in support of their own union organizing efforts. The Board agreed in both cases with the administrative law judges that the cases were controlled by *Republic Aviation Corp., supra.* NYNY contends that the Board's determinations are contrary to law. It is axiomatic that an individual or entity cannot be found to have violated § 8(a)(1) of the Act unless it is shown that its conduct coerced employees in the exercise of some right they have to engage in conduct protected by Section 7. Here, the off-duty Ark employees had no freestanding, non-derivative right under Section 7 to have access to NYNY's private property for the purpose of engaging in handbilling in support of their union organizing efforts because they had no employment

relationship with NYNY.[5] Thus, NYNY's conduct in prohibiting the handbilling activities that are the subject of these appeals did not violate Section 8(a)(1). As shown below, *NLRB v. Babcock & Wilcox, Co.*, 351 U.S. 105 (1956), *Hudgens v. NLRB*, 424 U.S. 507 (1976), and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), as well as other controlling authority regarding the respective rights of property owners and employees, require a finding that the Ark employees be treated as nonemployees of NYNY because of the absence of any employment relationship with the Company.

In *Babcock & Wilcox, supra,* the Supreme Court determined as a general rule that an employer may validly prohibit distribution of union literature by nonemployees. 351 U.S. at 112. An exception exists where "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them . . . ." *Id.* at 113. *See also, ITT Industries, Inc. v. NLRB*, 251 F.3d at 999 ("For nearly fifty years, it has been black-letter labor law that the Board cannot order employers to grant nonemployee union organizers access to company property absent a showing that on-site employees are otherwise inaccessible through reasonable efforts.") (citations omitted). The legal premise upon which the exception is based is that the nonemployee union organizers derive certain limited rights of access to the employer's private property from the rights of the property owner's employees under Section 7 to seek union representation. *Id.* at 1000.

---

[5] It is not disputed that the individuals who were engaged in the handbilling had no employment relationship with NYNY. In fact, in *New York New York I*, the Board expressly declined to consider the General Counsel's exception to the ALJ's failure to find that the Ark employees had some type of employment status with NYNY as a result of an alleged "symbiotic relationship" between NYNY and Ark. [App.1, n.3.]

The Supreme Court revisited *Babcock & Wilcox* in a somewhat different context in *Hudgens v. NLRB, supra*. In *Hudgens*, striking warehouse employees picketed at their employer's warehouse and its nine retail stores. One of those stores was located in a shopping mall and was leased from the mall owner, Hudgens. When the employees began picketing at that store, Hudgens' representatives threatened them with arrest if they did not leave. The pickets eventually departed the premises, but the union filed an unfair labor practice charge, alleging that Hudgens had interfered with the workers' Section 7 rights.

When the case finally reached the Supreme Court, a crucial issue was whether the rights of the parties were to be evaluated under the First Amendment, the NLRA, or some combination thereof. The Court decided that the individuals involved in the picketing had no constitutional right to engage in such activities on private property. Rather, the parties' rights and obligations were to be decided solely under the NLRA.

The Court did not decide whether Hudgens had violated § 8(a)(1) of the Act by denying the picketing employees access to its private property. Instead, the case was remanded to the Board to evaluate the activity pursuant to the NLRA. In doing so, the Court stated that:

> [u]nder the Act the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights, 'and to seek a proper accommodation between the two.' (citation omitted.) What is 'a proper accommodation' in any situation may largely depend upon the content and the context of the § 7 rights being asserted.

424 U.S. at 521. Citing *Babcock & Wilcox* and referring to its later decision in *Central Hardware Co. v. NLRB,* 407 U.S. 539 (1972), the Court observed that it had previously considered the nature of the Board's duty in this area. Specifically, "[a]ccommodation between

employees' § 7 rights ... and employers' property rights 'must be obtained with as little destruction of one as is consistent with the maintenance of the other.'" 424 U.S. at 521.

The Court also noted that *Babcock & Wilcox* and *Central Hardware* concerned nonemployees engaged in organizational activity on an employer's private property, and that "the context of the § 7 activity [in *Hudgens*] was different in several respects which may or may not be relevant in striking the proper balance." *Id.* at 521-2 (footnote omitted). Those differences were: (1) *Hudgens* involved economic strike activity; (2) the Section 7 activity was carried on by the lessee's employees; and (3) "the property interests impinged upon in this case were not those of the employer against whom the § 7 activity was directed, but of another." *Id.* at 522. The Board was directed to consider further if these differences precluded application of *Babcock & Wilcox* to the case. There was no dispute that the striking Butler employees had rights under Section 7 to picket their employer. The major issue in the case was how to accommodate these rights with the private property rights of the mall owner.

On remand, in *Scott Hudgens*, 230 N.L.R.B. 414 (1977), the Board considered the three factual differences between the case and *Babcock & Wilcox* identified by the Supreme Court. The Board found that none of the three distinctions required it to reverse its initial determination that Hudgens had violated Section 8(a)(1).

However, the Board's evaluation of the second factor – that the Section 7 activity was carried on by a lessee's employees rather than the property owner's employees – is directly relevant to the cases now before the Court. According to the Board:

> [w]ith respect to the Court's second distinguishing factor, that the picketers were employees of the company whose store they were picketing rather than nonemployees, as were the union organizers in *Babcock & Wilcox*, it is basic that Section 7 of the Act was intended to protect the rights of employees rather than those of

nonemployees. *With this principle in mind, the employee status of the pickets here entitled them to at least as much protection as would be afforded to nonemployee organizers, such as those in Babcock & Wilcox.* **(emphasis added)**

230 N.L.R.B. at 416.

Importantly, the Board went on to apply the *Babcock & Wilcox* analysis to the activities in dispute because the matter involved nonemployees of the property owner who the owner could otherwise properly exclude from its premises. Thus, the Board looked to see whether the picketing employees had any reasonable alternative means of communication. In agreement with the ALJ, the Board determined that the mass media, under the circumstances of this case, did not provide a reasonably effective vehicle for the employees to publicize their labor dispute to their intended audience. *Id.* Consequently, according to the Board, Hudgens violated the Act when it precluded the picketing activity at the mall.

The significant point to be gleaned from *Hudgens* is that in engaging in an analysis of whether there were reasonable alternative means of communication, the Board equated the picketers who were employees of the lessee *with nonemployee union organizers*. Had the principles enunciated in *Republic Aviation* controlled the decision, the analysis would have been entirely different. *Republic Aviation's* general rule would have applied: the Butler employees would have been entitled to distribute union literature in non-working areas on non-working time. The Board would then have had to have determined whether Hudgens presented evidence that the distribution could be banned for reasons of plant discipline and production. Such an analysis was not performed by the Board because the individuals involved in the Section 7 activity were not the employees of the property owner.

After *Hudgens*, the NLRB had occasion to consider other cases where the rights of employees and nonemployees conflicted with those of a private property owner. Most notable in this regard was *Jean Country*, 291 N.L.R.B. 11 (1988), where the Board decided that it would evaluate all access cases under the same standard. However, the practical effect of *Jean Country* was to undercut the holding in *Babcock & Wilcox,* and served to weaken the rights of private property owners.

The Supreme Court resolved the tension between the two cases in *Lechmere, Inc. v. NLRB*, *supra*. There, the Court found that in developing the *Jean Country* "balancing test," the Board had misconstrued *Babcock & Wilcox*. The Court also clarified that its decisions subsequent to *Babcock & Wilcox* did not erode the holding in that case. According to the Court, "[t]here is no hint in *Hudgens* and *Central Hardware* . . . that our invocation of *Babcock's* language of 'accommodation' was intended to repudiate or modify *Babcock's* holding that an employer need not accommodate nonemployee organizers unless the employees are otherwise inaccessible." 502 U.S. at 534. The Court made it clear that in instances where private property rights come into conflict with the rights of nonemployees, the private property rights will, with extremely limited exception, prevail. Stated another way, *Lechmere* "simply announced that as far as access is concerned, third parties must be treated less favorably than employees." *Id.* at 546 (Justice White, dissenting).

2. The Board's determinations in the cases now before the Court are contrary to the controlling law.

In both cases now before this Court, the off-duty employees of a lessee – nonemployees of NYNY – engaged in handbilling on NYNY's private property and were requested to cease.

When they refused, they were cited for trespassing. These facts are squarely on point with the Supreme Court and NLRB precedent discussed above.

Notwithstanding this well-established authority, the Board adopted both ALJs' determinations that *Republic Aviation* applied to these cases. These conclusions are erroneous and contrary to law. *Republic Aviation* applies only where the employer is attempting to accommodate the distribution rights of its *own* employees. The handbillers in these cases were employed by Ark, not NYNY.

In both cases, neither the ALJs nor the NLRB undertook any analysis of the pertinent Supreme Court and Board authority. To support his conclusion in *New York New York I*, the ALJ stated – with no further explanation – that the General Counsel's argument in favor of the application of *Republic Aviation* was "well-supported" by *MBI Acquisition Corp. d/b/a Gayfers Dept. Store*, 324 N.L.R.B. 1246 (1997) ("*Gayfers*"), and "drew further nourishment" from *Southern Services, Inc.*, 300 N.L.R.B. 1154 (1990), *enf'd*, 954 F.2d 700 (11th Cir. 1992). [App. 8.] In *New York New York II*, the ALJ found – with almost no explanation – that the "Ark workers should be considered to be 'employees' under the Act for purposes of assessing their rights to distribute union materials at their work site." [App. 503.] The Judge likewise cited *Gayfers* to support his finding, as well as *Harvey's Resort Hotel,* 271 N.L.R.B. 306 (1984). Petitioner submits that these cases do not justify the conclusion that *Republic Aviation* controls these matters because *Harvey's Resort Hotel* is distinguishable, and *Gayfers* and *Southern Services* were wrongly decided.

Harvey's Resort Hotel is plainly inapplicable because it concerned the validity of a no solicitation/no distribution rule as applied to the employer's *own* off-duty employees. Board law is clear that off-duty employees have certain rights to engage in union activity, such as

handbilling, at particular locations on their own employer's private property. *See, Tri-County Medical Center,* 222 N.L.R.B. 1089 (1976).[6] However, those rights exist only where there is an employment relationship between the off-duty handbiller and the private property owner. In the absence of such a relationship, the off-duty handbiller is, logically, a nonemployee and cases such as *Tri-County Medical Center* and *Harvey's Resort Hotel* are not germane.

Gayfers simply does not comport with applicable NLRB and Supreme Court precedent. In that case, employees of a subcontractor performing electrical work for a retail store located in a mall engaged in area standards handbilling during their lunch hour at the entrance to the store and entrances to the mall. The Board did not apply the *Babcock & Wilcox* test to the nonemployees' handbilling activities. Instead, it applied *Republic Aviation* and as shown below, the Board's legal analysis is fatally flawed.

In order to avoid application of *Lechmere*, the *Gayfers* Board erroneously focused on whether the contractor's employees were "rightfully on the property" of the mall owner. In finding that they were, the Board effectively created a fictional employment relationship with the property owner. According to the Board, "[b]ecause [the] employees ... work exclusively and regularly at Gayfers (footnote omitted), they were not 'strangers' to the [r]espondent's property, but rightfully on it pursuant to their employment relationship." 324 N.L.R.B. at 1250. Determining that the handbillers were not "strangers" and hence, not "trespassers," the Board went on to apply *Republic Aviation*. There was absolutely no consideration of the fact that the

---

[6] Under *Tri-County Medical Center,* NYNY could maintain a "no access" rule for its own off-duty employees so long as the rule limited access solely with respect to the interior of the hotel/casino and other working areas. 222 N.L.R.B. at 1089. If NYNY could validly deny access to the interior of its facility to its *own* off-duty employees, it should have the same right with regard to employees of a lessee. The Board's decisions do not address this issue.

handbillers were not employees of the mall owner, or what effect the decision would have on the mall owner's private property rights.

There are two basic errors in the Board's reasoning in *Gayfers*. First, the rationale of the case entirely disregards the fact that the Board and Supreme Court have already determined that *Babcock & Wilcox* applies in situations where a lessee's employees attempt to exercise Section 7 rights on the lessor's private property. The Board completely ignored the fact that *Hudgens* was remanded by the Supreme Court for a determination under the standards of *Babcock & Wilcox* – not *Republic Aviation.*

Second, the Board's reasoning all but eviscerates the Supreme Court's decisions in *Babcock & Wilcox* and *Lechmere*. The Board has taken individuals having no employment relationship with the store owner and has essentially made them the store owner's "employees" in order to permit the handbilling on the private property. Assuming *arguendo* the handbillers may have been "rightfully on the property" and not "strangers" by virtue of their employment relationship with the subcontractor, it requires a tortured interpretation of the Act to elevate those individuals to the status of the store owner's employees in order to grant them access to the store owner's private property.[7]

Southern Services, is equally inconsistent with established Board and Supreme Court authority. However, even if it were consistent, it is so factually distinguishable from the cases now before the Court that it has no application. In that case, an employee of Southern Services,

---

[7] The ALJ in *New York New York II* found that the Ark handbillers are "employees" within the meaning of the NLRA. [App. 503.] Yet, he failed to consider *who* employs them. NYNY does not contest the handbillers' status as "employees" within the meaning of the NLRA. It *does* dispute that **it** has any sort of employment relationship with these individuals such that it was required to open its private property to them to engage in handbilling activities.

Inc., ("SSI"), a company providing janitorial services to Coca-Cola, distributed organizational handbills to co-workers on Coca-Cola's property as she and her fellow employees were reporting for work. Coca-Cola maintained a "no solicitation/no distribution rule" applicable to nonemployees at the facility and directed the individual to cease handbilling on its property. In the ensuing NLRB proceedings, the ALJ applied *Babcock & Wilcox* and *Jean Country* and determined that the complaint should be dismissed because the General Counsel failed to show that the SSI employees had no other reasonable means of communication. The Board disagreed with the ALJ's analysis, applied *Republic Aviation* and found that SSI and Coca-Cola had failed to show that the distribution of handbills in non-working areas on non-working time was necessary to maintain production and discipline at the complex.

The Board did not consider whether the case should have been decided under *Babcock & Wilcox*. To the contrary, the Board assumed away any such consideration by concluding that the SSI employees were properly on the Coca-Cola property as a result of the contractual relationship between the companies.

The facts of *Southern Services* also plainly show that it is readily distinguishable from the cases before the Court here. First, the handbiller was distributing materials to her co-workers – not customers of Coca-Cola, the property owner. Here, the intended targets of the leafleting were not Ark employees, but rather visitors to NYNY who passed through the porte cochere doors or walked by the entrances to America and Gonzales.

Second, the handbilling took place at the entrance used by the SSI employees to enter the Coca Cola premises, and the SSI employee distributed the handbills while coming into work.[8] Here, the Ark employees engaged in handbilling were not on their way to work, were not on a break or meal period, and had not just completed their shifts. They came to NYNY for the express purpose of handbilling the hotel/casino's customers and guests. Thus, the Ark employees were not on the premises "pursuant to their employment relationship" with Ark. To the contrary, it appears that they were there at the direction of the Union.

With respect to the factual differences between *Southern Service* and this case, it is important to note that the Eleventh Circuit Court of Appeals, in enforcing the Board's order, stated explicitly that its holding was narrow: "The rule we announce applies to subcontract employees whose continuous and exclusive workplace is on Coca-Cola's premises, *and affects only their right to distribute union literature to their fellow subcontract employees in nonworking areas during nonworking time." Southern Services, Inc., and the Coca-Cola Co. v. NLRB,* 954 F.2d 700, 704-05 (11th Cir. 1992) (emphasis added). The rule does not apply here, where off-duty Ark employees were engaged in area standards handbilling to NYNY guests in areas where NYNY's employees were performing their work duties, and which are not utilized by Ark employees.[9]

---

[8] In *Gayfers*, the subcontractor's employees also engaged in handbilling at the mall while on their lunch break.

[9] This Court has further recognized the inherent unreliability of *Southern Services* because it "issued only one month after *Lechmere* and contains no reference to the Supreme Court's decision. The Eleventh Circuit's opinion thus has limited persuasive value – it does not account for *Lechmere's* express reaffirmation of the employee/nonemployee distinction, particularly its reliance on statutory mention of the term 'employee.'" *ITT Industries*, 251 F.3d at 1003.

In *New York New York I*, the Board attempted to reconcile *Gayfers* and *Southern Services* with its decision in *Hudgens*. [App. 2.] The Board found no inconsistencies between *Gayfers*, *Southern Services* and *Hudgens* because, according to the Board, unlike the individuals in *Gayfers* and *Southern Services*, the picketers in *Hudgens* "did not regularly work at the mall and thus were not rightfully on the mall property pursuant to their employment relationship." [App. 2.] However, this explanation is wholly inadequate because it is directly contrary to the Board's own precedent in which it has found that employees who work at one of their employer's facilities have access rights to other facilities of the employer. *See, ITT Industries, Inc.*, 331 N.L.R.B. No. 7 (May 10, 2000), *enforcement denied in relevant part and remanded, ITT Industries, Inc. v. National Labor Relations Board*, 251 F.3d 995 (D.C. Cir. 2001); *Southern California Gas Co.*, 321 N.L.R.B. 551 (1996); *U.S. Postal Service*, 318 N.L.R.B. 466 (1995).

The Board's effort to harmonize the cases also completely ignores the fact that in *Hudgens*, the Board found no distinction between the access rights of nonemployees "rightfully on the property" and the access rights of nonemployees "not rightfully on the property." Both groups were afforded the same Section 7 rights with respect to their employer. Both groups were also treated the same vis-à-vis the private property owner; specifically, *Babcock & Wilcox* was applied instead of *Republic Aviation*. Consequently, there is no way in which *Gayfers* and *Southern Services* can be reconciled with *Hudgens*.

Both ALJs further attempted to support their conclusions by pointing out that Ark employees were allowed to return to NYNY during their off-duty hours. [App. 7, 503.] However, the administrative law judges failed to acknowledge that the Ark employees could do so only to patronize NYNY's gaming, dining, hotel or amusement facilities. On such occasions, they are not "rightfully on the property" as a result of their employment with the lessee – they are

at NYNY in the capacity of guests or customers.[10] As such, they stand in the shoes of any other patron of the hotel/casino when they engage in distribution on the Company's private property, and NYNY may properly request that they cease that activity, just as it may do with any other patron or guest. *See, Restatement (Second) of Torts* § 168 ("A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with."), § 169 ("A consent given by a possessor of land to the actor's presence on a part of the land does not create a privilege to enter or remain on any other part."), and § 170 ("A consent given by a possessor of land to the actor's presence on the land during a specified period of time does not create a privilege to enter or remain on the land at any other time.") (1965).

The facts established in *New York New York I* illustrate the fallacy of the Board's reasoning. There are many individuals, who, while performing their job duties, might be said to be "rightfully on NYNY's private property," or not "strangers" to NYNY. For example, taxi drivers are summoned to the property by doormen. [App. 331.] Airport shuttles drivers pick up and deliver passengers to the porte cochere every 15 minutes. [App. 332.] There are also limousine drivers, persons delivering flowers, newspapers and baggage, and armored truck employees who have occasion to be present on the property performing tasks for their respective employers. [App. 333-334.] Under *Gayfers* and *Southern Services,* any one of these individuals with a legitimate business reason for being on NYNY property may be elevated to the status of a NYNY employee for purposes of exercising Section 7 rights on the privately owned hotel/casino

---

[10] Therefore, it is wrong to refer to the off-duty Ark employees as "invitees." They are not returning to areas where they perform work, and they are not performing duties for their employer. They are engaged in leisure activities.

premises.[11] Thus, if the airport shuttle drivers were involved in a union organizing campaign, the drivers – according to *Gayfers* – would have the right to handbill at NYNY by virtue of the fact that NYNY invites their employer to send them onto NYNY property to pick up customers and guests. In other words, NYNY's private property rights would *always* give way to the Section 7 rights of an employee of another employer who was rightfully on the property as a result of his or her job duties. This clearly was not the intent of *Babcock & Wilcox, Lechmere,* or even *Republic Aviation.*

Gayfers and *Southern Services* are a departure from precedent addressing access issues because the analysis in both cases centered on whether the handbillers had a "relationship" with the private property in question (a "stranger" or "trespasser" versus an "invitee"), instead of the relationship, if any, between the handbiller and private property *owner*. The relevant inquiry in access cases for purposes of determining whether to apply *Babcock & Wilcox* or *Republic Aviation* is not whether the handbiller is rightfully on the property, but whether an employment relationship exists between the private property owner and the individual seeking access rights to the private property.

3. The Board failed to engage in a considered analysis and explain its reasons for granting nonemployees Section 7 access rights to NYNY's private property.

The Board's decisions in these cases irreconcilably conflict with the recent decision of this Court in *ITT Industries v. NLRB*, 251 F.3d 995 (D.C. Cir. 2001). There, the Court

---

[11] The NLRB's effort to distinguish such individuals from Ark employees on the ground that they visit NYNY's facility only "intermittently" is not supported by substantial evidence. [App. 1-2.] For example, the record reveals that airport shuttles pick up and deliver passengers to the porte cochere every 15 minutes and the Company leases three limousines, the drivers of which are frequently and regularly in the porte cochere. [App. 332.]

> handbill at another of the employer's plants."). Indeed, by applying the *Tri-County* balancing test, the Board decided ***without analysis*** that trespassing off-site employees possess access rights equivalent to those enjoyed by on-site employee invitees. ***Because it is by no means obvious that § 7 extends nonderivative access rights to off-site employees, particularly given the considerations set forth in the Court's access cases, the Board was obliged to engage in considered analysis and explain its chosen interpretation.*** **(emphasis added).**

Id.

The Court found that the Board had not met its responsibility in that regard. According to the Court: "[n]oticeably absent from this discussion is any mention of the employer's property rights or the different interpretive considerations presented by trespassing employees. There is certainly no consideration of the degree to which extending nonderivative access rights to off-site employees might intrude upon state trespass laws." *Id.* at 1005 (citations omitted).

The same criticisms this Court made of the Board's decision in *ITT Industries* apply with even greater force to the decisions before this Court here. In both of these cases, the Board assumed that the off-duty Ark employees had the same access rights as those of NYNY's employees, without any analysis of the legal basis for such rights. The Board's reliance upon *Gayfers* and *Southern Service* does not serve as a substitute for a meaningful analysis because both cases are bereft of any consideration of why nonemployees have access rights to a third party's private property.

Here, the Board offered no explanation of why the Ark employees had any freestanding, non-derivative Section 7 rights of access to the NYNY property. The Board also engaged in no analysis or consideration of NYNY's property rights and the consequences the decisions would have on those rights. Finally, the Supreme Court's decision in *Hudgens* makes clear that the Board was obligated to seek a proper accommodation between the Section 7 rights of the Ark

employees and NYNY's private property rights, yet it attempted to make no accommodation whatsoever.

Ironically, the decisions before the Court are also directly contrary to the Board's own most recent determinations in a directly analogous case involving the rights of off-duty employees to have access to another of the employer's facilities. *Hillhaven Highland House*, 336 N.L.R.B. No. 62, 2001 NLRB LEXIS 854 (Sept. 30, 2001), was decided three months after this Court issued its decision in *ITT Industries* and two months after the Board decided the instant cases. In determining that offsite employees did have nonderivative, Section 7 access rights to other facilities of their employer, the Board stated:

> [o]ffsite employees are not only "employees" within the broad scope of Section 2(3) of the Act, they are "employees" in the narrow sense: "employees of a particular employer" (in the Act's words), that is, employees of the employer who would exclude them from its property. ***Clearly, then, these workers are different in important respects from persons who themselves have no employment relationship with the particular employer.*** **(emphasis added)**

336 N.L.R.B. No. 62, slip op. at 3. In *Hillhaven*, the employer argued that the offsite employees were "strangers" to the location where they did not work and, thus, had no right of access. The Board rejected this contention, reasoning:

> [o]f critical importance ... is the fact that an employment relationship exists between [offsite employees] and the employer, which distinguishes offsite employees from the ordinary trespasser, who is truly a stranger. The existence of an employment relationship, in turn, means that the employer has a lawful means of exercising control over the offsite employees (even regarded as trespasser), independent of its property rights. Surely it is easier for an employer to regulate the conduct of an employee – as a legal and a practical matter – than it is for an employer to control a complete stranger's infringement on its property interests. The employer, after all, controls the employee's livelihood.

Id. at 4. Although *Hillhaven* was decided only two months after *New York New York I* and *New York New York II,* the Board made no reference to either case in its decision. This is curious since it would seem that Board decisions granting access rights to nonemployees would be relevant to a case in which the Board was considering access rights of employees of the property owner who happened to work at another facility. Even more curious, however, is how the same Board members could have relied so strongly upon the employee status of the handbillers in determining access rights in *Hillhaven* and given absolutely no consideration to that status in the decisions in these cases, rendered only two months before.[12]

More importantly, the analysis undertaken in *Hillhaven* would plainly have required a different result had it been applied to the cases at issue here. First, in neither case did the off-duty Ark employees seeking access to the private property of NYNY have an employment relationship with the Company. In the absence of such a relationship, there existed no means for NYNY to regulate or control the infringement on its private property other than through reliance on state trespass laws. For example, a valid NYNY rule denying its own employees access to the interior of the hotel would have been of little use to NYNY in these circumstances, since the Company would have been unable to enforce the rule against the off-duty Ark employees. Indeed, the Company would lack *any* means to ensure compliance with the rule. In the absence of the ability to regulate the conduct of the Ark employees, it is clear from *Hillhaven* that they are "ordinary trespassers" with respect to NYNY's private property.

Second, unlike *Hillhaven*, the reasonableness of the Board's decisions in *New York New York I* and *New York New York II* cannot be assessed because the Board did not engage in a

---

[12] Board member Walsh also participated in the *Hillhaven* decision.

considered analysis of whether individuals having no employment relationship with the private property owner have a right of access to the property. The Board simply decided with no reasoned explanation that a lessee's employees have free-standing, nonderivative access rights to the lessor's private property. In light of this Court's ruling in *ITT Industries*, it was incumbent upon the Board to explain its decision. The Board has failed to do so, not only in the two cases on appeal but also in *Gayfers* and *Southern Services*.

Next, even if the Board had presented considered justifications for interpreting Section 7 to grant sweeping access rights to Ark's employees, the Board failed to explain why off-duty employees of a lessee enjoy even greater access rights than the off-duty employees of the private property owner.

Based on the above, it is manifest that the Board's reliance upon *Republic Aviation* is a departure from existing NLRB and Supreme Court precedent. Given that both cases before the Court involve the access rights of individuals who were not employed by NYNY, the Board should have applied the standard in *Babcock & Wilcox*. The failure to apply governing law to these cases precludes enforcement of the Board's Decisions and Orders.

B. NYNY Lawfully Prohibited Handbilling In The Porte Cochere, At The Entrance To America, And In The Village Streets Even If The Off-Duty Ark Employees Had The Same Access Rights As Its Own Employees.

Assuming *arguendo* that the Court were to agree with the NLRB that the off-duty Ark employees had the same access rights to NYNY property as employees of NYNY, the Company did not violate Section 8(a)(1) when it precluded the off-duty Ark workers from handbilling in the porte cochere and at locations inside the hotel/casino. *Republic Aviation* does not stand for the proposition that an employee's right to engage in Section 7 activity on his employer's private property is absolute. To the contrary, *Republic Aviation* permits an employer to prohibit

distribution of literature in working areas. Under *Republic Aviation,* an employer may also ban such activities in non-working areas when it can demonstrate that distribution would interfere with "plant discipline or production." *See*, 324 U.S. at 797-798.

As shown below, there is not substantial evidence to support the Board's finding that the locations inside and outside of NYNY where the off-duty Ark employees engaged in handbilling were non-work areas. Therefore, the Board erred in finding that NYNY's prohibition violated Section 8(a)(1). Even if the substantial record evidence established that the sites were non-work areas, the record evidence establishes that the prohibition was necessary to maintain "production," – service to the customers of NYNY, and "discipline," – insuring the safety and security of both NYNY guests and employees.

1. The Board's finding that the porte cochere is not a work area is not supported by substantial evidence.

The evidence in the record establishes beyond question that the porte cochere is a work area. At least three separate job classifications of NYNY employees spend their entire shifts performing duties in that location, and other NYNY employees regularly and frequently engage in their various job duties in that area. The undisputed facts show that doormen, valet attendants and baggage handlers are all *stationed* in the porte cochere. As such, that is their primary work location. Indeed, in *New York New York I*, Judge Nelson acknowledged that the valet attendants, bellmen and doormen "spend substantially all of their work time in the [p]orte [c]ochere area." [App. 6-7.] Judge Metz, in *New York New York II,* confirmed that these job classifications "regularly work at this location." [App. 502.] Two doormen per shift stand at the front doors hailing cabs, greeting patrons, directing limousines and shuttles, and opening vehicle doors. Numerous valet attendants spend their entire eight-hour shifts in the porte cochere area parking

and retrieving customer cars. Baggage handlers are stationed in the center of the porte cochere in order to assist arriving and departing guests with luggage.

Significantly, the responsibilities of the doormen, valet attendants and baggage handlers entail dealing directly with NYNY patrons – the intended targets of the Union's handbilling. Thus, the potential for "interference with production" is great. For example, a baggage handler trying to give instructions to a guest on how to retrieve luggage upon checking into the hotel would likely be impeded in his duties were a handbiller simultaneously trying to distribute a leaflet to the customer and explain the nature of a labor dispute with Ark. This interference would be magnified in situations where the baggage handler had several guests to service, and the resulting backup of customers waiting for such service could directly impact the duties of the valet attendants and/or doormen.[13]

There is also undisputed evidence in the record regarding tasks performed in the porte cochere by maintenance techs/engineers, painters, roller coaster mechanics, carpenters, electricians, locksmiths, security officers and environmental services workers. The evidence shows that some of these classifications spend a *significant* amount of time performing job duties

---

[13] The ALJ in *New York New York I*, and hence, the Board, erred in basing their finding that the porte cochere was not a work area on the ground that NYNY did not present evidence that the handbilling activity actually interfered with the NYNY employees' job duties or customer ingress and egress. [App. 2.] This finding was also erroneously relied upon by the NLRB in *New York New York II*. [App. 498.] It is important to note that the activity giving rise to these carefully staged "test cases" occurred during relatively quiet weekday afternoons. Thus, little may be inferred from these particular instances as to the potential that other handbilling could be disruptive of the work of NYNY employees performed in these areas and/or customer ingress and egress. More importantly, the fact that there were no disruptions should not have been considered by the Board in making the determination as to whether the locations where the handbilling occurred were work areas. As Chairman Hurtgen, citing *Republic Aviation*, pointed out in his dissent in *New York New York II,* an employer may presumptively prohibit handbilling in a location once it is established that the particular location is a work area, and there is no burden on the employer to present evidence of actual interference with operations. [App. 501.]

in that location. Thus, in *New York New York I*, ALJ Nelson found that "other NY-NY employees, such as maintenance and security personnel, work or appear at regular intervals in the Porte-Cochere area as part of their roving duties. Still other NY-NY employees, too varied in classification to capture briefly, may find *ad hoc* business reasons to visit or perform tasks in the Porte Cochere." [App. 7.] This evidence, when viewed in conjunction with the evidence concerning the doormen, valet attendants and baggage handlers, fully supports NYNY's position that the porte cochere is a work area. It also establishes that the Board's finding is not supported by substantial evidence.

As noted above, both ALJs found and the Board acknowledged that certain NYNY employees work in the porte cochere. [App. 2, 6-7, 498, 503-504.] Nevertheless, relying upon the rationale in *Santa Fe Hotel & Casino*, 331 N.L.R.B. No. 88 (July 12, 2000), the Board found the porte cochere to be a non-work area because the duties performed by the various NYNY employees in that location were only "incidental" to the Company's main function of gaming and lodging. [App. 499.] The Board's conclusions, both here and in *Santa Fe,* are erroneous.

In *Santa Fe* and the present cases, the NLRB has taken its previous holding in *U.S. Steel Corp.*, 223 N.L.R.B. 1246 (1976) to an untenable extreme. In *U.S. Steel Corp.*, the Board determined that the parking lots of the company were non-work areas, even though maintenance personnel and security guards performed "some tasks" in the parking lots. 223 N.L.R.B. at 1247-1248. The facts here are much different. Employees do not simply perform "some tasks" in the porte cochere – they perform "all tasks" in this area. All of the work duties of employees in three job classifications are performed at this location 24 hours per day, seven days per week.

Significantly, the porte cochere has not been designated as a location where non-work activities are to occur. In *U.S. Steel Corp.*, the Board explained its rationale for permitting distribution in areas where "some tasks" are performed:

> In primarily nonworking areas, the element of protecting the production process is not present. Whether employees are distributing literature or doing other nonwork functions, like washing up, loitering, or eating, on their own time in areas designated for these purposes makes no difference to production or the tasks performed by employees in these nonwork areas.

Id. NYNY's employees do not engage in nonwork activities in the porte cochere. There is no evidence that NYNY employees take breaks, eat lunch, or change into their uniforms in the porte cochere. The valet attendants, bellmen and doormen are not "on their own time" when they are in the porte cochere. These three job classifications, plus others, report to the porte cochere for one reason – to work. Unlike the parking lots in *U.S. Steel Corp.*, where little, if any, actual work was performed, there is a very real need to protect the "production process" in the porte cochere.

Similarly, the fact that the porte cochere at NYNY is not a gaming area or a place of lodging does not compel the conclusion that it is not a work area. It cannot seriously be contended that the duties of the valet attendants, baggage handlers and doormen are "incidental" to NYNY's main function. The Company's main function is not limited to gaming and lodging, as stated by the Board. [App. 499.] NYNY also has restaurants, meeting rooms, showrooms, an arcade, a roller coaster, and a number of other venues and services available for its patrons. Consequently, the more accurate characterization of NYNY's "main function" is that of providing lodging, dining, gaming, and entertainment, and the duties performed around-the-clock by employees in the porte cochere are an integral part of that function. A valet attendant may not

deal a patron a hand of cards, but his/her duties contribute directly to the patron being able to enjoy the entire experience of visiting NYNY.

Santa Fe and the cases on appeal irreconcilably conflict with *U.S. Steel Corp.* The test used by the Board in *U.S. Steel Corp.* to determine whether a location constituted a work area was whether employees performed more than "some tasks" in the area in question. *See,* 223 N.L.R.B. at 1247-1248. *U.S. Steel Corp.* does not stand for the proposition that a particular situs is a nonwork area if the employees' duties in that location are "incidental" to the main business of the employer. In determining whether the handbilling or other Section 7 activities in a particular location are likely to interfere with work being performed in that area, the relevant inquiry is the amount of work, not the type of work performed in that area. For example, under the Board's analysis, NYNY's payroll employees would also be considered to be performing duties that are "incidental" to the Company's main business purposes. However, it is beyond dispute that NYNY could properly preclude handbilling in the areas of the payroll department where employees are working. The porte cochere is no different from the payroll department in the sense that employees perform most or all of their work duties at these sites. A meaningful analysis of this issue can only lead to the conclusion that the porte cochere is a working area where NYNY properly precluded handbilling, and the Board's findings to the contrary are not supported by substantial evidence.

2. The Board's finding that the sites of the handbilling inside NYNY are not work areas is not supported by substantial evidence.

In *New York New York II*, the Board acknowledged the ALJ's finding that NYNY employees "do work consistently in the areas near the passageways where the handbilling occurred." [App.499.] Based on this finding, the Board should have concluded that the sites

chosen by the off-duty Ark employees to engage in handbilling are work areas and that NYNY's handbilling prohibition did not violate Section 8(a)(1). Acknowledging that NYNY employees are consistently in the particular areas to do work necessarily means the areas are work areas. Consequently, the Board's determination is not supported by substantial evidence.

The uncontested facts show that nearly 20 different job classifications of NYNY employees perform their job duties in, or in close proximity to, the area where the off-duty Ark employees engaged in handbilling activity. Some of the duties are performed on a continuous basis, such as pan mopping, delivering or picking up luggage and going into and out of the America restaurant with Keno tickets. Other duties are performed periodically, such as serving complimentary drinks and emptying trash. Still other duties, like dust mopping and polishing the wood on the front desk are performed hourly. Certain duties are performed on a daily basis, such as cleaning the escalators and greeting tour buses. A few functions are performed on an as needed basis, for example, cleaning up spills and broken glass. Whatever the frequency, the record demonstrates that NYNY employees maintain a constant presence in the disputed areas. As such, these sites should have been treated as work areas by the Board.

The Board majority found the interior areas at issue to be nonwork areas notwithstanding the fact that they acknowledged that employees do "work consistently" near where the handbilling occurred. [App. 499.] However, the Board imposed an additional requirement to justify finding that the locations were work areas. Specifically, the Board required a showing that the handbilling actually interfered with the work of the NYNY employees who were consistently in the area. [*Id.*] This additional factor does not comport with *Republic Aviation*. Board Chairman Hurtgen properly found the area in front of America to be a work area. He also correctly observed that "under *Republic Aviation*, once it is established that an area is a work

area, the employer can presumptively ban handbilling there. *There is no need to show that handbilling in fact is interfering with the employer's operations.*" [App. 501, n.5.] (emphasis added). NYNY needed only to show that the interior areas at issue were work areas in order to justify its handbilling ban. It satisfied that evidentiary burden. Consequently, it was improper for the Board to impose an additional requirement in the analysis of whether a particular location constituted a work area. When the Board's newly imposed criterion is removed, substantial evidence does not support its finding that the locations in dispute are not work areas.

3. The Board's finding that the handbilling prohibition was not necessary to maintain "discipline" and "production" is not supported by substantial evidence.

Assuming *arguendo* the Board's findings that the areas where the handbilling occurred are nonworking areas are supported by substantial evidence, NYNY nevertheless lawfully barred the handbilling at those locations because such a prohibition was necessary to maintain "discipline" and "production." In *Republic Aviation,* the Supreme Court upheld the Board's ruling that an employer may preclude its employees from distributing union literature in non-working areas during non-working times where it can be shown that such a ban is necessary to maintain plant discipline or production. 324 U.S. at 803. As demonstrated below, the Company presented sound, unrebutted evidence to support its position that prohibiting handbilling in front of America, Gonzales, in the Village Streets, and the porte cochere is necessary to ensure proper service to patrons of NYNY, and for the safety and security of these guests, its employees and its property.

Inexplicably, Judge Metz did not address the Company's arguments in *New York New York II* regarding this issue. Rather, he summarily concluded, with no analysis, that NYNY "has not shown that the Ark employees' distribution of union handbills to the public interfered with

maintaining production or discipline at the [Company's] casino." [App.503.] The Board likewise found that NYNY failed to establish that the handbilling "was *likely* to interfere with production or discipline...." [App. 499.] (emphasis added). By using the word "likely," the Board appears to have disagreed with the ALJ that actual proof of interference was necessary. The Board sought only a showing of the *potential* for interference. NYNY satisfied this showing, and a finding to the contrary is not supported by the record.

In *New York New York II*, Judge Metz properly found that the aisles or passageways in front of America, Gonzales and in the Village Streets were heavily traveled by visitors to NYNY in getting from place to place within the facility. [App. 502.] Hotel guests staying in the Century, Chrysler, and New Yorker Towers must pass by America's entrance when checking in or out of the hotel at the front desk, using the business center, or using the mail and information window. In like manner, guests arriving through the tour bus entrance must walk through the Village Streets in order to access virtually all of the gaming, lodging, entertainment and food services offered at NYNY.

Guests also use the passageways in order to avail themselves of services offered by NYNY that are not located on the main floor. Specifically, hotel sales, a health spa, conference rooms, a beauty parlor and a men's salon are all located on the upper floors of the hotel/casino, and the only way to access these services is to use one of NYNY's four banks of elevators. The record duly demonstrates that the passageways in front of America and Gonzales, through the Village Streets, and those leading to the various Tower elevators are utilized as much by NYNY patrons as by NYNY employees. Consequently, the handbilling ban was necessary to maintain "discipline" – insuring the safety and security of the Company's guests and employees.

The handbilling ban was also proper for purposes of maintaining "production" because the locations in issue also function as aisles or passageways for NYNY workers. The record shows that the employee entrance near America is utilized by large numbers of NYNY employees for a myriad of reasons. In that regard, Judge Metz found that "employees regularly walk past the restaurant entrances ... on their way to other areas of the casino." [App 502.]

The fact that the areas near the entrances of America and Gonzales and in the Village Streets also serve aisles or passageways for NYNY guests and NYNY workers is significant. In *Marshall Field & Co.*, 98 N.L.R.B. 88 (1952), *modified,* 200 F.2d 375 (7th Cir. 1952), the Board determined that a retail employer could permissibly impose a solicitation/ distribution ban in the aisles, corridors, elevators, escalators and stairways inside its store, reasoning that "[w]hile such areas are not devoted to selling purposes, it is patent that solicitation carried on in such limited space may create traffic and safety hazards tending to disrupt and interfere with [the employer's] business to a serious degree." *Id.* at 92 (footnote omitted).[14]

Applying *Marshall Field,* an employer operating a hotel/casino may maintain a ban on solicitation and distribution in those locations where it is reasonable to conclude that such activities will interfere or disrupt business operations.

The record before the Court demonstrates the necessity of having such a prohibition in a busy Las Vegas resort hotel and casino. The substantial record evidence shows that the locations where the handbilling occurred are heavily traveled by NYNY employees in the performance of their work duties and in getting to and from their respective work stations. The areas are also

---

[14] When assessing the legality of solicitation or distribution rules as applied to a particular location at a hotel/casino, the Board has analogized the hotel/casino to a retail store. *See, M & R Invs., Inc.,* 284 N.L.R.B. 871, 875 (1987).

"high traffic" areas for NYNY guests. The handbilling occurred in front of two prominent restaurants at NYNY, not near a remote location such as a delivery dock. Even without handbilling activity, the substantial record evidence shows that there is a significant amount of employee and customer activity near the entrances of America and Gonzales and in the Village Streets. Handbilling in these locations by off-duty Ark employees would certainly create safety hazards. Consequently, NYNY's prohibition is fully supported by the Board's determination in *Marshall Field.*

The Board majority did not focus on the fact that NYNY employees work in the areas where the handbilling occurred, use the areas to travel to and from their work locations, or that NYNY guests and patrons use the passageways to visit the various attractions inside NYNY and to travel to and from their hotel rooms. Instead, the Board improperly focused on the *size* of the area where the handbilling occurred. [App. 499-500.] The Board carefully combed the language in *Marshall Field*, and observed that solicitation could properly be prohibited in aisles, corridors and passageways because "solicitation carried on *in such limited space* may create traffic and safety hazards tending to disrupt and interfere with [r]espondent's business to a serious degree." [App. 499.] (emphasis in original). Seizing upon the emphasized language, the Board refused to apply the *Marshall Field* rationale because, in the Board's view, the handbilling within NYNY took place in "spacious passageways...." [App. 499.] (emphasis added).

In short, the Board recognized that its decision in *Marshall Field* on its face might sanction a prohibition of handbilling in these areas. Thus, in order to achieve its desired result, it was necessary for the Board to create a new standard for determining whether handbilling must be permitted in a particular situs. It appears that the relevant inquiry now focuses on the size of the area at issue rather than the potential for the interference with business. If space is limited,

Marshall Field will apply; if space is not limited, handbilling must be allowed. The Board has presumably defined a "limited space" as being less than 25 feet, because that was the distance between the entrance to America and the nearest bank of slot machines. [App. 499.] Therefore, any space greater than 25 feet may be used for handbilling, irrespective of whether the handbilling creates traffic and safety hazards. Petitioner submits that the Board's reasoning severely departs from the intent of *Marshall Field*. *Size* is not the issue; whether the areas are used as aisles or passageways where business may be disrupted is the dispositive factor for determining whether *Marshall Field* applies.

With regard to the handbilling in the porte cochere, the record from *New York New York I* reveals that security and safety issues abound as a result of activities in that location. With six traffic lanes, the porte cochere is obviously a busy and congested area. Limousines, taxi cabs, customer cars, airport shuttles, bicycles, ambulances, and delivery vehicles travel through the porte cochere at varying degrees of frequency. This is an inherently dangerous situation. In fact, there have been several accidents in the port cochere involving vehicles, vehicles and property, and vehicles and persons. There have been occasions when ambulances have had to be called to the porte cochere in response to medical emergencies.

The porte cochere is a heavily "populated" location, which can lead to safety and security issues. Aside from the numerous NYNY employees and customers who are in the porte cochere at any given time, the undisputed evidence shows that there are cab drivers, limousines drivers, and airport shuttle drivers making frequent passenger pick ups and deliveries in the porte cochere. There are also persons delivering items such newspapers, flowers, baggage, soft drinks, and laundry. In addition to the regular customer-related activities occurring in that area, there is continuous routine cleaning and maintenance as well as cleaning and maintenance performed on

an as needed basis. The potential for accidents significantly increases with the occurrence of activity not typically associated with a porte cochere, such as leafletting.

Further, there is a high level of person-to-person contact within the porte cochere which NYNY must be able to control in order to secure the safety and security of everyone in the area. The record establishes that there have been altercations between cab drivers and passengers. There have also been disputes between inebriated patrons attempting to retrieve their vehicles and NYNY security personnel concerned with their welfare. Occasionally, "coin snatchers" inside the casino have attempted to flee and have been pursued through the porte cochere.

The purpose of the porte cochere – and having employees in the porte cochere – is to move arriving patrons into and out of the facility as quickly and smoothly as possible. To permit handbilling would clearly cause distraction which could lead to accidents. A customer exiting from a taxi could have his attention drawn to the leafletting activity and step in front of a departing limousine. A handbiller with his back to the doors talking to patrons might get in the way of a paramedic rushing out of the facility with a patient. In sum, there are ample discipline, safety, and service reasons why NYNY's ban on handbilling in the porte cochere is necessary. Like the inside areas of the facility, the Company has demonstrated that handbilling in the porte cochere is *likely* to interfere with production and discipline, and it was error for the Board to conclude that the Company may not preclude handbilling activity in that area.

CONCLUSION

The Board's Decisions and Orders in the cases on appeal are a departure from controlling law of the Board and Supreme Court and are not supported by substantial evidence. The standard set forth in *Republic Aviation* should not have been applied in either case because the handbillers involved in these cases were not employed by NYNY. Assuming *arguendo* some

sort of fictional employment relationship with NYNY existed, the substantial record evidence demonstrates that the areas targeted for handbilling are work areas and even if they were not, substantial record evidence illustrates that handbilling at those sites would likely result in interference with production and discipline. Consequently, the Board's findings and conclusions in *New York New York I* and *New York New York II* must be set aside and enforcement of the orders should be denied.

Respectfully submitted,

VERNER, LIIPFERT, BERNHARD,
MCPHERSON & HAND, CHARTERED

Gary C. Moss
3960 Howard Hughes Parkway, #400
Las Vegas, Nevada 89109
(702) 737-3433
(702) 737-1612 (telecopier)

Celeste M. Wasielewski
901 15th Street, N.W.
Washington, D.C. 20005
(202) 371-6000
(202) 371-6279 (telecopier)
Attorneys for Petitioner

Dated: June 18, 2002

SCHEDULED FOR ORAL ARGUMENT
THURSDAY, OCTOBER 17, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEW YORK NEW YORK, LLC, d/b/a NEW YORK NEW YORK HOTEL & CASINO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent,

and

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 BARTENDERS UNION, LOCAL 165,
Intervenor.

Consolidated Cases No. 01-1351 & 01-1352

CERTIFICATE OF WORD COUNT AND SERVICE

The undersigned hereby certifies that the Brief of Petitioner New York New York, LLC, d/b/a New York New York Hotel & Casino meets the requirements of Circuit Rule 28(d)(1) by containing 13,508 words. The undersigned further certifies that copies of the same and the Joint Appendix were sent *via* Federal Express on June 18, 2002 to:

Aileen Armstrong
Margaret A. Gaines
Steve Goldstein
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Richard G. McCracken, Esq.
McCracken, Stemerman, Bowen & Holsberry
1630 South Commerce Street – Suite A-1
Las Vegas, Nevada 89102

Celeste M. Wasielewski

Attorney for Petitioner

DATED: June 18, 2002

Richard G. McCracken, Esq.
McCracken, Stemerman, Bowen & Holsberry
1630 South Commerce Street – Suite A-1
Las Vegas, Nevada 89102

Celeste M. Wasielewski

Attorney for Petitioner

DATED: June 18, 2002

SCHEDULED FOR ORAL ARGUMENT
THURSDAY, OCTOBER 17, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEW YORK-NEW YORK, LLC, d/b/a NEW YORK-NEW YORK HOTEL & CASINO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent,

and

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 and BARTENDERS UNION, LOCAL 165,
Intervenor.

Consolidated Cases No. 01-1351 & 01-1352

ON PETITION FOR REVIEW OF THE DECISIONS AND ORDERS OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS-APPLICATION FOR ENFORCEMENT OF THE DECISIONS AND ORDERS

REPLY BRIEF OF PETITIONER NEW YORK-NEW YORK, LLC, d/b/a NEW YORK-NEW YORK HOTEL & CASINO

Gary C. Moss
Verner, Liipfert, Bernhard,
McPherson and Hand, Chartered
3960 Howard Hughes Parkway, Suite 400
Las Vegas, Nevada 89109
(702) 737-3433
(702) 737-1612 (telecopier)

Celeste M. Wasielewski
Verner, Liipfert, Bernhard,
McPherson and Hand, Chartered
901 15th Street, N.W.
Washington, D.C. 20005
(202) 371-6000
(202) 371-6279 (telecopier)
Attorneys for Petitioner

Doc #7428 (8/22/02)

EXHIBIT B

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

---

* Authorities upon which we chiefly rely are marked with asterisks.

SUMMARY OF THE ARGUMENT

In accordance with Rule 28(c) of the Federal Rules of Appellate Procedure and pursuant to this Court's Order filed July 1, 2002, Petitioner New York-New York, LLC d/b/a New York-New York Hotel & Casino ("New York-New York," "NYNY," "Company," or "Petitioner") submits the following Reply Brief in response to the briefs filed by Respondent National Labor Relations Board ("NLRB," "Board," or "Respondent") and Intervenor Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165 ("Union" or "Intervenor"). As set forth in Petitioner's Opening Brief [Petitioner's Brief] and shown below, Respondent and Intervenor have failed to demonstrate that the Board's decisions in *New York New York LLC d/b/a New York New York Hotel & Casino and Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO*, 334 N.L.R.B. No. 87 (2001) ("*New York New York I*") and *New York New York Hotel LLC d/b/a New York New York Hotel & Casino and Culinary Workers Union, Local 226, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO*, 334 N.L.R.B. No. 89 (2001) ("*New York New York II*") are entitled to judicial deference. *See ITT Industries, Inc. v. National Labor Relations Board*, 251 F.3d 995, 999 (D.C. Cir. 2001).

Instead, the clear weight of Supreme Court authority and other precedent establishes that the decisions before this Court should be set aside and denied enforcement. The handbilling at issue in both cases was performed by non-employees of NYNY and thus, the Board should have applied the standard set forth in *NLRB v. Babcock & Wilcox*. The Board's application of the standard articulated in *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), which governs instances where employees seek access to the private property of their employer, is unreasonable and

inconsistent with controlling precedent. In addition, rather than analyzing the competing § 7 and property rights "in a detailed and reasoned fashion" as mandated by the law of this Circuit, the Board automatically granted the employees of Ark Las Vegas Restaurant Corporation ("Ark") unfettered rights while trampling on NYNY's property rights. *See ITT Industries*, 251 F.3d at 1004 (citations omitted). Finally, Respondent and Intervenor have not shown that substantial evidence supports the Board's findings that the areas where the handbilling occurred are non-work areas or that there would be no disruption to NYNY's business if such activities by non-employees were allowed to occur. The Board and Intervenor's attempts to make post-hearing justifications and unsupported policy arguments to support the decisions are to no avail.

ARGUMENT

I. RESPONDENT AND INTERVENOR HAVE NOT ESTABLISHED THAT THE ACCESS ISSUES INVOLVED IN THESE CASES ARE CONTROLLED BY THE *REPUBLIC AVIATION* STANDARD.

A. *Republic Aviation* Does Not Apply To The Instant Cases Because The Off-Duty Ark Employees Had No Employment Relationship With New York New York.

Notwithstanding assertions to the contrary by Respondent and Intervenor, the Supreme Court's decisions in *Republic Aviation, supra*, *NLRB v. Babcock & Wilcox*, *supra*, *Hudgens v. NLRB*, 424 U.S. 507 (1976) and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) leave little doubt that the extent, if any, of an individual's right of access to private property for the purpose of engaging in purported § 7 activity is determined by whether there is an employment relationship between the private property owner and the individual seeking access. Where such a relationship exists, the *Republic Aviation* standard applies; in the absence of an employment relationship, the *Babcock & Wilcox* test controls. The relevant inquiry is not whether the individuals are "rightfully on the property."

The NLRB's decision in *Scott Hudgens*, 230 N.L.R.B. 414 (1977) reinforces this point. As discussed more fully in Petitioner's Brief, the employees seeking access to the mall which housed a store of their employer were treated by the Board as non-employee union organizers. [*See* Petitioner's Brief at 17-19.] In its reconsideration of the case on remand, the Board did not evaluate whether the mall owner properly banned distribution activities for purposes of "plant discipline and production" – the *Republic Aviation* analysis. Since there was no employment relationship with the mall owner, the Board applied the *Babcock & Wilcox* standard and considered whether the picketers had reasonable alternative means of communicating their message. While the Respondent and Intervenor go to great lengths to argue that the Board's decision in *Hudgens* does not support Petitioner's contentions here, the fact remains that the Board did apply the *Babcock & Wilcox* analysis in deciding that case. [*See* Brief of the Respondent National Labor Relations Board ["Respondent's Brief"] at 14-15, 22, 28, 30-32, 40, and Brief of the Intervenor Local Joint Executive Board, Culinary Workers Union Local 226 and Bartenders Union Local 165 ["Intervenor's Brief"] at 19-23.]

Lending additional support to Petitioner's position is the Board's recent decision in *Hillhaven Highland House*, 336 N.L.R.B. No. 62, 2001 N.L.R.B. LEXIS 854 (Sept. 30, 2001) ("*Hillhaven*"). In that case, the Board stressed that in determining what, if any, access rights to private property an individual may have, the existence of an employment relationship between the individual and the property owner is an extremely important element in the analysis. Given that the presence of an employment relationship between the property owner and the

individual(s) seeking access is "of critical importance," Respondent's position in the cases before the Court here is unreasonable and contrary to law.[1]

---

[1] While it is understandable that the Respondent does not want the Court to consider the Board's decision in *Hillhaven* and its own earlier decision in *ITT Industries*, Respondent's argument that the Court does not have jurisdiction under Section 10(e) of the National Labor Relations Act ("NLRA" or "Act") to consider the Company's arguments has no merit. [Respondent's Brief at 34-35.] First, there was no need for Petitioner to bring the *ITT Industries* decision to the Board's attention through a motion for reconsideration because that case, as relied upon by Petitioner, does not say anything new to the Board that has not been said by this and other appellate courts numerous times in the past. Specifically, the Board's interpretations of the Act must be "arguably consistent with the underlying statutory scheme in a substantive sense," and the Board must analyze issues "in a detailed and reasoned fashion." *ITT Industries*, 251 F.3d at 1004. Petitioner could have made the same argument citing *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133 (D.C. Cir. 1984) and *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), which were cited by the Court in *ITT Industries*. The Company chose to cite *ITT Industries* because it is the most recently-published authority of this Court on the subject. Moreover, the Board was presumptively aware of the *ITT Industries* decision when it rendered its decisions in these cases since the decision was issued on June 5, 2001, several weeks before the July 25, 2001 decisions here. In that regard, it is significant that in explaining why it was undertaking a detailed "accommodation" analysis in the *Hillhaven* case, the Board, on its own accord, acknowledged the *ITT Industries* decision. 336 N.L.R.B. No. 62, slip op. at 3. Therefore, it was obviously sensitive to the issues raised by the Court in that case.

Next, Respondent's reliance upon *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979) is misplaced. That case involved the failure of the company to take certain exceptions to the Board of an administrative law judge's decision. Petitioner does not seek to raise any substantive issues here that were not contained in its exceptions to the Board in *New York New York I* or *New York New York II*.

Third, Section 102.48(d)(1) of the Rules and Regulations of the National Labor Relations Board states in relevant part: "A party to a proceeding before the Board *may*, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order." 29 C.F.R. § 102.48(d)(1) (2000) (emphasis added). Under this rule, filing a motion for reconsideration discretionary. Given that *Hillhaven* issued over two months after the Board issued its decisions in *New York New York I* and *New York New York II*, and approximately one and one-half months **after** NYNY filed its petitions for review with this Court, Petitioner should not be penalized for not expending additional resources to bring the case to the Board's attention. In addition, it would have been futile for Petitioner to file a motion for reconsideration. Petitioner's exceptions and briefs in support of exceptions in both *New York New York I* and *New York New York II* argued the cases were not controlled by *Republic Aviation* because of the absence of an employment relationship between the off-duty Ark employees and

(continued)

1. The Board's Response Fails To Refute the Arguments Set Forth By Petitioner.

a. The Board's newly-created *Southern Services/Gayfers* Rule does not justify the Board's reliance on *Republic Aviation*.

In its brief, the Board attempts to harmonize its decisions in *New York New York I* and *New York New York II* with the relevant Supreme Court authority by inventing an employment relationship between NYNY and the off-duty employees of its lessee, Ark. In doing so, the Board relied entirely upon its earlier decisions in *Southern Services, Inc.*, 300 N.L.R.B. 1154 (1990), *enforced*, 954 F.2d 700 (11th Cir. 1992) and *MBI Acquisition Corp. d/b/a Gayfers Dep't Store*, 324 N.L.R.B. 1246 (1997) ("*Gayfers*"). Respondent has determined that the off-duty Ark employees have the same – if not greater – access rights as the Company's own employees because their employer has a contract to perform restaurant services for the Company. According to Respondent, the off-duty Ark employees are "rightfully on the property" because of their employment relationship with Ark, which in turn, has a business relationship with NYNY. Based on this extremely attenuated "relationship," the Ark employees have become ersatz employees of NYNY and, as such, have a virtually unfettered right to engage in § 7 activities in non-working areas throughout the premises.

There are several flaws with the newly-created "*Southern Services/Gayfers* Rule." First, nothing in either *Babcock & Wilcox* or *Lechmere* suggests that, or even considers the question of whether a property owner violates the Act by prohibiting individuals from distributing union literature on its property, when those individuals regularly and exclusively work on its property

---

(continued)
NYNY. Having unsuccessfully argued this position twice to the Board, Petitioner had no reason to believe that *Hillhaven* would have changed the Board's decisions.

by virtue of their being employed by the property owner's subcontractor. [Respondent's Brief at 18.] Nonetheless, according to Respondent, the applicability of these cases was "squarely presented" for the Board's determination in *Southern Services* and *Gayfers*. *Id.*

The Board's contention also ignores the fact that the Eleventh Circuit's decision enforcing the Board's order in *Southern Services* issued after *Lechmere*, and did not even reference the Supreme Court decision. The omission is significant, given "Lechmere's express reaffirmation of the employee/nonemployee distinction...." *ITT Industries*, 251 F.3d at 1003. In the absence of any discussion by the Eleventh Circuit as to whether *Southern Services* is in accord with *Lechmere*, the Board's decision in *Southern Services* is of no persuasive value regarding these cases.[2]

Even if the Eleventh Circuit had somehow squared the Board's *Southern Services* decision with *Lechmere*, the case is nevertheless inapplicable because it is entirely distinguishable from cases now before the Court. [*See* Petitioner's Brief at 23-25.] Respondent does not address these distinguishing factors, including the Eleventh Circuit's pronouncement that the holding in the *Southern Services* is extremely limited and "affects only [the right of subcontract employees] to distribute union literature to their fellow subcontract employees in

---

[2] *NLRB v. Villa Avila*, 673 F.2d 281 (9th Cir. 1982), relied upon by the Board, likewise, does not support its position. [*See* Respondent's Brief at 19.] The case was decided 10 years before *Lechmere*, so it is questionable whether the Ninth Circuit would have ruled the same way after that decision. This is particularly true given that *Villa Avila* involved the access rights of union business agents to a jobsite, and the Ninth Circuit used a balancing test in its review of the Board's order. 673 F.2d at 283. However, in *Lechmere*, the Supreme Court stated, in discussing *Babcock & Wilcox*, that a balancing of interests could only be undertaken in the context of *employee* activity and that "[i]n cases involving *nonemployee* activities ... the Board was not permitted to engage in that same balancing...." *Lechmere*, 502 U.S. at 537. Since *Villa Avila* involved union representatives seeking access to private property, rather than employees, the case conflicts with *Lechmere* and should not be relied upon by the Court.

nonworking areas during nonworking time." *Southern Services, Inc., and the Coca-Cola Co. v. NLRB*, 954 F.2d 700, 704-705 (11th Cir. 1992). Unlike *Southern Services*, in neither case before this Court were the off-duty Ark employees attempting to distribute literature to their fellow workers. In fact, the off-duty Ark employees did not engage in any purported § 7 activity in areas where they could reach their fellow workers.

Second, *Gayfers* does not support Respondent's position and should be disregarded by the Court. The subcontractors' employees in that case did not work "regularly and exclusively" at the mall. The subcontractor who had employed the handbilling workers had been hired to perform remodeling work at the mall. *Gayfers*, 324 N.L.R.B. at 1246. Given the nature of the work, it must be presumed that when the remodeling project was completed, the subcontractor would no longer be needed and its employees would no longer report to the mall for work. Their presence at the mall was thus temporary in nature. In this regard, the workers in *Gayfers* were analogous to the picketing workers in *Hudgens*, where the Board used a *Babcock & Wilcox* analysis.

In light of the foregoing and as shown in Petitioner's Brief, the Board's newly created "*Southern Services/Gayfers* Rule" should not be approved by the Court. The "*Southern Services/Gayfers* Rule" conflicts with controlling Supreme Court authority, and in neither case did the Board present a considered analysis of why that authority did not require a different outcome. Finally, both cases are distinguishable and the Board has failed to present persuasive arguments to the contrary.

b. NYNY did not open its private property to non-employee § 7 activity by the hiring of a subcontractor.

Another rationale for finding the fictional employment relationship between the Ark employees and NYNY, according to Respondent, is the fact that had NYNY used its own

employees in the food service operations in lieu of subcontracting the work, "*Republic Aviation* squarely would have governed any attempt by the property owner to prohibit them from distributing union literature." [Respondent's Brief at 21.] That may well be the case, but is irrelevant to the resolution of the issues presented here. The compelling point is that the Ark employees had no employment relationship whatsoever with NYNY, and Respondent and Intervenor's assertions that non-employees are somehow transformed into employees of another employer merely because they work "regularly and exclusively" in jobs that might otherwise be performed by employees of the property owner ignores the clear authority to the contrary. There are well established legal standards for determining employment status, and merely working regularly and exclusively at a location as a substitute for other employees does not meet those standards. *See, e.g.* 29 U.S.C. § 152(3) (1998); *Roadway Package System, Inc.*, 326 N.L.R.B. 842, 849 (1998) (setting forth the factors for determining an employer/employee relationship.)

NYNY also strongly disputes Respondent's assertion in the accompanying footnote that a property owner's rights are "weakened" as a result of its invitation to a subcontractor to work on its property. [Respondent's Brief at 21, n.3.] Respondent cites *Villa Avila, supra*, and *CDK Contracting Company*, 308 N.L.R.B. 1117 (1992), to support this position. Yet, as shown earlier, *Villa Avila* should not be relied upon because the Ninth Circuit's decision pre-dates *Lechmere*.

Equally unreliable is the Board's decision in *CDK Contracting*. In that case, the Board attempted to distinguish the case from *Lechmere* because it involved a general contractor's actions to ban union officials from a jobsite where a collective bargaining agreement between the union and subcontractor contained a visitation clause. *CDK Contracting*, 308 N.L.R.B. at 1117. The Board adopted the ALJ's reasoning that because the respondent "invited" subcontractors on

his decision. Petitioner submits that were *CDK Contracting*, *Villa Avila*, and the construction industry subcontractor theory in some way relevant to the issues here, the Board would have relied upon them in rendering these decisions. It did not, and it is clear that Respondent, through this argument in its brief, is attempting to articulate a rationale in support of the Board's decisions upon which the Board did not rely, which is improper. *See NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 444 (1965) (finding that the Board's action could not properly be reviewed since the Board had not articulated its rationale, and because "the integrity of the administrative process requires that 'courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . .'") (citations omitted); *Yukon-Kuskokwim Health Corp. v. NLRB*, 234 F.3d 714, 718 (2000) (remanding the matter to the Board for further proceedings because the Board had not adequately addressed an argument by the employer, and because the court could "not accept [the General Counsel's] *post hoc* rationalizations for [the Board's] action.") (citations omitted).

Respondent argues further that access rights should be granted in these cases because "employees who regularly and exclusively work on the property of another, by definition, have no other workplace where they can communicate with their fellow employees about workplace issues or urge their employer's customers to support their organizing efforts." [Respondent's Brief at 21-22.] Intervenor makes analogous arguments in its brief. [Intervenor's Brief at 11-12.] However, these arguments have no applicability here because the off-duty Ark employees were not attempting to communicate with their fellow workers and there were other means available to the employees to communicate with Ark's customers. Thus, the "national labor policy" invoked by the Board could not be impaired in any way.

2. The Intervenor's Brief Does Not Address Many of the Legal Issues Before the Court and Does Not Refute Petitioner's Contentions

a. The Union's brief misstates NYNY's position

In its brief, the Union does not respond to many of the various legal authorities and arguments presented by Petitioner. Rather, its basic position seems to be that the Court should affirm the Board's decisions on public policy grounds. To bolster its arguments, the Union misstates NYNY's position and uses that misstatement to create a parade of horribles by engaging in extensive speculation about what "could" happen if Petitioner is correct in its contentions here. However, the Union undertakes very little analysis of the specific issues before the Court, and when it does, essentially reiterates the arguments set forth by Respondent.

The Union clearly misstates NYNY's position in contending that NYNY is arguing that "on-site employees of its subcontractor have no rights against the Hotel under § 7 of the National Labor Relations Act, because these workers are not the Hotel's direct employees." [*See* Intervenor's Brief at 1-2.] NYNY has not made such a contention. The Company's contention is straightforward, and limited to the factual circumstances involved in these cases. NYNY contends that because the off-duty employees of one of its lessees have no employment relationship with NYNY, any right they may have to return to the premises and go to areas of the hotel/casino where they or none of their fellow employees engage in job duties, and indiscriminately distribute handbills to customers of NYNY in support of a union organizing attempt, must be evaluated under the standard set forth in *Babcock & Wilcox*, not the *Republic Aviation* standard. Petitioner further contends that in reaching its decisions, the NLRB failed to comply with its legal duty to consider, evaluate and accommodate the private property interests of NYNY with any right the Ark employees might have to engage in § 7 activities at its property.

These are the issues that are before this Court, not whether the Court's decision would have an effect on employees of other subcontractors in other industries, or whether NYNY could prohibit a contractor's employee from wearing a union button, or any of the other hypothetical actions or consequences articulated by the Union if NYNY's position is sustained. None of the hypotheses and contingencies cited the by Union are before the Court. Thus, they have no relevance to the resolution of this case. Those issues should be decided by the Board and ultimately the courts under the proper legal standards and authorities when, and if, they arise, and the possible resolution of those issues should have no bearing on these cases.

b. The Board's rulings did not take into consideration NYNY's property rights

The Intervenor contends that the sole issue here is the ability of the Ark employees to exercise § 7 rights as a result of their employment with Ark on the premises of NYNY. Petitioner contends that the issue that needs to be considered by the Board, but never was, is the property rights of NYNY. There can be no dispute that as a property owner, NYNY has constitutionally-guaranteed property rights. One of the most important of these property rights is the right to exclude others. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164 (1991)) (1991) ("The right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property.") Where the employer's property rights come into conflict with non-employee § 7 rights, the Board's accommodation of the two rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other." *Hudgens*, 424 U.S. at 521. As part of its inquiry, it was incumbent upon the Board to strike a balance between any § 7 rights the Ark employees might have with the rights of NYNY "to control the use of its property." *Lechmere*, 502 U.S. at

537. In order for this balance to be properly struck, the Board should have evaluated NYNY's right to exclude non-employees from the specific areas of its property involved in this case with the right Ark employees might have to seek the support of the public in their attempts to obtain union representation. In *Hudgens*, the Supreme Court clearly set forth what the Board's responsibility was when it stated that:

> [u]nder the Act the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights, 'and to seek a proper accommodation between the two.' (citation omitted.) What is 'a proper accommodation' in any situation may largely depend upon the content and the context of the § 7 rights being asserted.

424 U.S. at 521. Citing *Babcock & Wilcox* and referring to its later decision in *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), the Court observed that it had previously considered the nature of the Board's duty in this area. Importantly, the Court then went on to reaffirm its finding in *Babcock & Wilcox* that it was the Board's duty to make an accommodation of § 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other." *Id.* at 522.

Further, in *ITT Industries*, this Court has followed Supreme Court precedent and has mandated that prior to granting access rights, the Board must undergo an analysis of the property rights of the affected property owner. Specifically, in *ITT Industries*, the Board found that the employer had violated § 8(a)(1) of the Act when it prohibited employees who worked at one of its plants from coming on to the parking lot of another of the company's facilities to distribute union organizing literature to the employees who worked at that facility. The employer sought review of that decision in this Court, arguing that the Board had ignored its interests, including the right to exclude others from its property. In concurring with the employer's position, this

Court, in remanding the decision back to the Board, relied on *Babcock & Wilcox*, *Hudgens* and other Supreme Court authority. This Court stated:

> Because it is by no means obvious that § 7 extends nonderivative access rights to off-site employees, particularly given the considerations set forth in the Court's access cases, the Board was obliged to engage in considered analysis and explain its chosen interpretation.

251 F.3d at 1004.

The present case is even more compelling than *ITT Industries*. In *ITT Industries*, the Board found that off-duty employees of ITT Industries who were employed at one plant had access rights to other facilities of their employer. This Court found such a conclusion untenable. Here, the Board granted off-duty employees of Ark, who had no employment relationship with NYNY, extensive access rights to the NYNY premises without any consideration whatsoever of the possible effect of that access on NYNY's property rights. This conclusion and the manner in which the Board reached this result are contrary to Supreme Court precedent and this Court's directive in *ITT Industries*.

Intervenor argues that the Court's *ITT Industries* decision should not affect the Court's decision here because the Ark employees' situation differs from the employees involved in *ITT Industries* in that those employees were claiming "some vicarious right of access in the name of other workers at a location where they are themselves strangers." [Intervenor's Brief at 4.] That is not so. As the Board expressed in *Hillhaven*, "off-site employees" such as those who were involved in the *ITT Industries* case, have a direct interest in communicating with fellow employees and are not basing their access claim on the rights of the on-site employees. Specifically, the Board stated as follows:

> Nothing in either the Act or the Supreme Court's decisions establishes that the Section 7 rights of the employees of a particular employer, *as against that employer*, are somehow derivative of other employees' rights, when they are exercised at a location other than the customary site of employment.
>
> When an offsite employee seeks to encourage the organization of similarly situated employees at another employer facility, the employee seeks to further his own welfare. (citations omitted, emphasis added.)

Hillhaven, 336 N.L.R.B. No. 62, slip op. at 3.

c. The Union's policy argument is irrelevant and unsupported by case law.

As noted above, the Intervenor also attempts to assert that this Court should not disturb the Board's ruling because to do "would have a far reaching effect on American labor law." [Intervenor's Brief at 7.] Even if it were true that there may be individuals employed by subcontractors in different fields of employment who may be affected in some way by the decision, that should not affect the Court's evaluation of the legal issues. There are also many employers in those industries whose property rights would be affected by this Court's decision. Indeed, this contention demonstrates a major failing with Intervenor's entire argument, and most of the Respondent's – they assume that rights granted to employees under § 7 of the NLRA always are superior to and supercede any property rights of employers.

The issues now before the Court are not who will be affected by the Court's decision but: 1) whether the Board can seriously erode NYNY's constitutionally guaranteed property rights without considering or analyzing those rights; and 2) whether the Board can disregard Supreme Court and other case law which requires it to not only balance NYNY's property rights with any §7 rights that the Ark employees might have because they work on property owned by NYNY, but to also find an accommodation that minimizes the impingement of one of those rights to

ensure the maintenance of the other. Petitioner contends that the answer to each of these questions is no.

Ironically, some of the case law cited by the Union in support of its claim that the courts have previously allowed unfettered access to on-site non-employees contradicts rather than supports their position. A good example of this is *Seattle-First Nat'l Bank v. NLRB*, 651 F.2d 1272 (9th Cir. 1980). There, although the Ninth Circuit allowed the striking employees of a leased restaurant access to picket on the 46th floor of the building where the restaurant was located, it did not grant those same employees access to any other floor. Presumably their access was limited to the 46th floor because that was where they had been employed. Since they were not employed by the building owners or any other tenants, they did not normally have access to the rest of the building. Significantly, in making its decision, the Ninth Circuit applied the *Babcock & Wilcox* analysis, not the *Republic Aviation* test. The Court also modified the Board's proposed order and limited the number of picketers who could be present outside the entrance to the restaurant because of the potential effect of larger numbers on the property rights of other businesses in the building. Finally, this Court noted that the accommodation analysis must take into account the nature of the § 7 right involved, in that case picketing an employer during a strike. The Court specifically acknowledged that other forms of § 7 activities, such as the area standard leafleting involved here, might not be entitled to such protections. *Seattle-First*, 651 F.2d at 1276. No such analysis was undertaken by the Board in these cases.

B. Respondent Has Failed To Show That Substantial Evidence Supports The Findings That The Porte Cochere And Areas Inside NYNY Are Non-Work Areas.

As set out in detail in Petitioner's Brief, the Company did not violate Section 8(a)(1) of the Act when it precluded the off-duty Ark workers from passing out handbills in the porte

cochere and at various locations inside the hotel/casino. Even if the Court were to adopt the Board and Intervenor's position that the Ark employees' status as non-employees is irrelevant and thus, the *Republic Aviation* standard applies to this case, the inquiry does not end there. *Republic Aviation* still allows an employer to prevent the distribution of literature in working areas. It also provides for the same preclusion in non-work areas if such distribution would interfere with "plant discipline or production." *Republic Aviation*, 324 U.S. at 797-798. The record below and Petitioner's Brief clearly demonstrate that the locations inside and outside of NYNY where the handbilling occurred meet both tests. The evidence was overwhelming that the locations were work areas. Even if they were not, however, because the work performed there was "incidental" to the major purpose of NYNY's business, the Ark employees' activities were still likely to interfere with "discipline" and "production." Respondent and Intervenor's Briefs fail to demonstrate otherwise.

Respondent and Intervenor's reliance upon several hospital-related cases is misplaced in several regards.[4] Unlike the cafeteria in *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 490 (1978), the porte cochere and the locations inside the hotel where the handbilling occurred are not common gathering rooms for employees. To the contrary, they are locations where many NYNY employees regularly perform their jobs. Important functions related to NYNY's business are performed by those employees in these areas, twenty-four hours a day, seven days a week.

Although this Court upheld the Board's order allowing nurses to distribute literature in the vestibule of hospitals in *Brockton Hospital v. National Labor Relations Board*, 294 F.3d 100

---

[4] Intervenor's attempts to analogize this case to *ISKCON v. Lee*, 505 U.S. 672 (1992) and *Lee v. ISKCON*, 505 U.S. 830 (1992), two cases involving free speech rights of solicitors in a public airport [*see* Intervenor's Brief at 31-32] also is irrelevant since neither presented issues similar to those involved in this case.

(2002), this is distinguishable from the events involved here on two bases. First, the vestibule in Brockton Hospital was not a work area because the work performed there was simple cleaning, escorting, and occasional security activity. In making the determination that this was not a work area, the Board relied upon the occasional nature of the work that occurred there. *Brockton Hospital*, 294 F.3d at 107. The Board found that work which occurs only sporadically, such as janitorial service in and around an entryway, does not make an area a "work area." The work performed by the NYNY employees in the areas involved here is far from sporadic. To the contrary, work occurs in these areas on a continuing basis. Although some of that work includes occasional janitorial work, it also includes the frequent and regular meeting of guests, parking of cars, and escorting of guests and their luggage by valets and bellpersons whose full time jobs are to perform such activities in those areas. These are not sporadic or temporary forays, but rather, full-time activities by the workers in these job classifications. In addition, these locations are not self-contained spaces distinct from clearly determined work areas, but rather, are work areas themselves. *Brockton Hospital*, 294 F.3d at 107. Contrary to Respondent's assertion that these are simply passageways through which employees pass in the course of their work, these areas are the primary locations where these employees perform their jobs. [*See* Respondent's Brief, at 47-48.]

Second, in *Brockton Hospital*, the nurses made clear that they only would be distributing the leaflets to other nurses, not to patients or visitors, suggesting a limited impact to the public. The Board had found that this was not a work area and the hospital did not present any evidence indicating that this activity would disturb patients or disrupt operations. *See NLRB v. Baptist Hospital*, 442 U.S. 773, 782-86 (1979) (upholding solicitation ban in corridors and sitting rooms where the hospital had shown that solicitation would disturb patients and impact operations.)

Here, Petitioner has demonstrated that due to the nature of the work performed in each of the areas, there is a high probability that handbilling there would be disruptive. [*See* Petitioner's Brief at 42-45.] Thus, Petitioner has not only demonstrated that the areas at issue are "work areas," but has also presented substantial evidence that handbilling in these cases could have a substantial impact upon the operations of the business.

The Board relies on two of its prior decisions, *Santa Fe Hotel & Casino*, 331 N.L.R.B. No. 88 (July 12, 2000) and *Flamingo Hilton-Laughlin*, 330 N.L.R.B. 287, 294 (1999), to support the contention that the work performed in the porte cochere area in front of the main entrance and the passageways in front of the two restaurants is merely "incidental" to the employer's primary business purpose, thereby rendering these areas non-work areas. However, these cases are inapposite.[5]

Notably, a key point distinguishes *Santa Fe* from the present case – the employees engaged in the handbilling on Santa Fe property were Santa Fe employees. The ALJ acknowledged the import of this fact when he stated at the onset of his analysis: "[s]everal significant points are worthy of emphasis at this point in my analysis. First, the individuals who engaged in the handbilling involved in the ... incidents were [r]espondent's *own* employees. *ITT Industries*, 336 N.L.R.B. No. 62, slip op. at 11 (emphasis added). Later in his discussion, the judge again deemed it necessary to point out that the handbilling at issue "was engaged in by

---

[5] Moreover, Respondent's contention that "it is undisputed that the primary function of a hotel-casino is to provide games of chance and to lodge guests" [Respondent's Brief at 26] and its citation of *Santa Fe* to support the claim is wrong as applied to NYNY. The Company specifically disputed the Board's position that its main function is limited to gaming and lodging. [Petitioner's Brief at 37.] The Board's position is not supported by the substantial record evidence, which shows that NYNY offers extensive other forms of activities and services to its visitors, such as a game arcade, shows, conference rooms, and retail stores.

[r]espondent's *own* employees and *not by nonemployees*...." *Id.* at 12 (emphasis added). Given that the employer/property owner's own workers were involved, the principle in *Republic Aviation* applied rather than *Lechmere*. The same cannot be said there, where the handbillers have no employment relationship with the NYNY.

The reasoning behind *Flamingo Hilton-Laughlin* also does not support the Board's contention. *Flamingo Hilton-Laughlin's* analysis is based by analogy on *Marshall Field & Co.*, 98 N.L.R.B. 88 (1952), *modified* 200 F.2d 375 (7th Cir. 1952). As described in more detail in Petitioner's Opening Brief, the *Marshall Field's* analysis does not focus on the size of the area but the fact that due to the nature of the aisleways and walkways, incidents may occur which could disrupt the employer's business. [Petitioner's Brief at 42-45.] Here, the passageways in question, in front of America and Gonzalez, are located within the confines of the hotel building, including the lobby, and are the very type of heavily traveled areas used by employees and customers about which the Board in *Marshall Field* was concerned. Therefore, in this instance, there clearly is a potential detrimental impact upon the gaming operations and other hotel related activities.

CONCLUSION

Supreme Court authority is clear that an individual's ability to have access to the private property of another for the purpose of engaging in § 7 activities is controlled by whether there is an employment relationship between the individual and the private property owner. The substantial record evidence in *New York New York I* and *New York New York II* conclusively demonstrates that no such relationship exists between the Company and the employees of its lessee. The Board's attempt to create a fictional employment relationship under the newly-created "*Southern Services/Gayfers* Rule" necessarily fails because both cases were wrongly decided, are distinguishable from the cases on appeal, and most importantly, irreconcilably

conflict with controlling Supreme Court precedent. Even if the Board's invention of an employment relationship between the lessor and the lessee's employees were not a departure from governing law, the substantial record evidence shows that the areas where the handbilling activity in these cases occurred are work areas for NYNY employees. Consequently, Petitioner's ban was proper and the Board's decisions in *New York New York I* and *New York New York II* should be set aside and denied enforcement.

Respectfully submitted,

VERNER, LIIPFERT, BERNHARD,
MCPHERSON & HAND, CHARTERED

Gary C. Moss
3960 Howard Hughes Parkway, #400
Las Vegas, Nevada 89109
(702) 737-3433
(702) 737-1612 (telecopier)

Celeste M. Wasielewski
901 15th Street, N.W.
Washington, D.C. 20005
(202) 371-6000
(202) 371-6279 (telecopier)

Attorneys for Petitioner

Dated: August 23, 2002

SCHEDULED FOR ORAL ARGUMENT

THURSDAY, OCTOBER 17, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEW YORK-NEW YORK, LLC, d/b/a NEW YORK-NEW YORK HOTEL & CASINO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent,

and

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 BARTENDERS UNION, LOCAL 165,
Intervenor.

Consolidated Cases No. 01-1351 & 01-1352

CERTIFICATE OF WORD COUNT AND SERVICE

The undersigned hereby certifies that the Reply Brief of Petitioner New York- New York, LLC, d/b/a New York-New York Hotel & Casino meets the requirements of Circuit Rule 28(d)(1) by containing 6,081 words. The undersigned further certifies that copies of the same were sent *via* Federal Express on August 23, 2002 to:

Aileen Armstrong
Margaret A. Gaines
Steve Goldstein
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Richard G. McCracken, Esq.
McCracken, Stemerman, Bowen & Holsberry
1630 South Commerce Street – Suite A-1
Las Vegas, Nevada 89102

Michael T. Anderson
Davis, Cowell & Bowe, LLP
1155 15th Street, NW, Suite 405
Washington, D.C. 20005

Celeste M. Wasielewski

Attorney for Petitioner

DATED: August 23, 2002