UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK NEW YORK HOTEL, LLC, D/B/A
NEW YORK NEW YORK HOTEL AND CASINO,

and 28-CA-14519 & -15148

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS,
CULINARY WORKERS UNION, LOCAL 226, AND
BARTENDERS UNION, LOCAL 165, UNITE HERE.

BRIEF, *AMICI CURIAE*, OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, and THE AFL-CIO BUILDING AND CONSTRUCTION TRADES DEPARTMENT

INTRODUCTION

In two prior unanimous decisions, the Board found that the New York New York Hotel and Casino ("NYNY") committed unfair labor practices when NYNY prohibited employees of Ark Las Vegas – NYNY's food concessionaire operating from various locations within the hotel complex under a contract with the hotel – from distributing, in nonwork areas of the complex near their work locations, handbills publicizing their organizing campaign. *New York New York Hotel & Casino*, 334 NLRB 762 (2001); *New York New York Hotel & Casino*, 334 NLRB 772 (2001).[1] As the D.C. Circuit observed, the Board's decisions rested on the legal premise "that when employees of a contractor work regularly and exclusively on [another employer's] property, their § 7 rights are

[1] In the second *New York New York* decision, Member Hurtgen dissented only from the finding that one of the locations was a nonwork area. 324 NLRB at 775.

equivalent to those of th[at] employer's own employees." *New York New York, LLC v. NLRB*, 313 F.3d 585, 587 (D.C. Cir. 2002).

The D.C. Circuit refused to enforce the Board's decisions on the ground that "[t]he Board provided no rationale to explain why, in areas within the NYNY complex but outside of Ark's leasehold, Ark's employees should enjoy the same § 7 rights as NYNY's employees." *New York New York*, 313 F.3d at 588. In this regard, the court of appeals stated that "the critical question in a case of this sort is whether individuals working for a contractor on another's premises should be considered employees or nonemployees of the property owner." *Id*. 590. And, the court observed that "the Supreme Court's opinions . . . yield[] no definitive answer" to this question:

> "No Supreme Court case decides whether the term 'employee' extends to the relationship between an employer and the employees of a contractor working on its property. No Supreme Court case decides whether a contractor's employees have rights equivalent to the property owner's employees – that is, *Republic Aviation* rights to engage in organizational activities in non-work areas during non-working time so long as they do not unduly disrupt the business of the property owner – because their work site, although on the premises of another employer, is their sole place of employment." *Ibid*.

Accordingly, the court remanded for the Board to answer the critical question – "whether a contractor's employees have [*Republic Aviation*] rights equivalent to the property owner's employees" – "by applying whatever principles it can derive from the Supreme

Court's decisions [and] 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." *Ibid*.

In sum, the court of appeals first recognized that "NYNY's employees" have "rights to engage in organizational activities in non-work areas during non-working time so long as they do not unduly disrupt the business of the property owner [NYNY]," and then called upon the Board to explain the basis for its conclusion that the fact the Ark employees' "work site . . . on the premises of another employer, [i.e., NYNY] is their sole place of employment" entitles those employees to "rights equivalent to the property owner's employees."

In cases like this where a statutory-employer/property-owner prohibits activity protected by § 7 of the National Labor Relations Act on its property, "the basic objective under the Act [is the] accommodation of § 7 rights and private property rights 'with as little destruction of one as is consistent with the maintenance of the other.'" *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976), quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). "The locus of that accommodation . . . 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." *Ibid*.

As we now show, "the nature and strength of the respective § 7 rights and private property rights" in the context of this case are no different in any relevant respect than they would have been had NYNY acted against food service employees employed

directly by NYNY for distributing the pro-union handbills instead of against food service employees employed by Ark, NYNY's food concessionaire operating within the hotel complex under a contract with the hotel. Accordingly, the "accommodation of § 7 rights and private property rights" struck in this case should, on that ground, be in favor of protecting the exercise of § 7 rights here, just as it would be had NYNY acted against food service employees employed directly by the hotel.

STATEMENT OF FACTS

The factual context in which the legal question here arises has been accurately stated by the Board in its prior decisions and can be succinctly summarized as follows.

First of all, the relationship between NYNY and Ark is, in essence, this:

> "The New York New York Hotel and Casino ('NYNY') is a large theme hotel and gaming facility located on South Las Vegas Boulevard. It opened for business on January 3[, 1997]. Unlike the vast majority of such businesses it does not operate the restaurants and food service outlets in the building. Instead, it has contracted with [Ark Las Vegas Restaurant Corp.] to run them. [Ark] asserts that it is a tenant of certain areas of the property, based upon the written agreements which it has with NYNY. Whatever the 'lease' may say, it is better described as the food service concessionaire for NYNY.
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> "In the performance of that role [Ark] runs the following restaurants within the hotel: America (which seats about 500 customers); Gallagher's (a steak house); Gonzalez y Gonzalez ('GYG') a Mexican restaurant; The Village Streets,

a food court consisting of ten fast food outlets; and the Employee Dining Room ('EDR') (350 seats; open only to employees of NYNY, [Ark] and the Feld Entertainment theater company employees). In addition, it provides room service to hotel guests and banquet catering within the hotel. In support of this operation it has kitchens for each restaurant and the EDR, plus a separate production kitchen which prepares (and pre-prepares) certain food items common to the restaurants, and a stewards department which performs the necessary dishwashing, cleanup and general janitorial functions. It is a very big food service operation, employing about 900 persons on a 7 days per week, 24 hours per day basis." *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1287 (2001).

Second, the relationship between NYNY and the hotel food service employees employed by Ark is, in essence, this:

"All employees working within Ark's restaurants are employed exclusively by Ark, but according to the terms of Ark's employee handbook they are also subject to NY-NY's own 'policies' respecting such things as 'employee entrances, parking, drug testing, name tags [and] conduct at the hotel while off and on duty.' NY-NY permits, even encourages, off-duty, employees of Ark to visit and patronize the casino and the restaurants in the complex and to use routes open to the public, including through the Porte-Cochere, to enter or exit from the complex. Indeed, it appears that NY-NY (and Ark, in turn) imposes only two restrictions on the visitation rights of off-duty Ark workers – that they not wear their work

uniforms, and that they not patronize the bars." *New York New York*, 334 NLRB at 767-768.[2]

Third, the initial incident that gave rise to the first of these unfair labor practice cases was this:

> "On July 9, 1997, three off-duty Ark employees went to the 'porte-cochere' (the area just outside the main entrance to the casino), where they stood on the sidewalk and attempted to distribute handbills to customers as they entered the facility. The handbills bore an area standards message, stating that Ark paid its employees less than unionized workers and urging customers to tell Ark to sign a union contract. The handbills expressly disclaimed any dispute with [NYNY]. Shortly after the handbillers appeared, they were informed by managers of [NYNY] that they were trespassing on [NYNY's] property and that they were not allowed to solicit or distribute handbills there. When the handbillers refused to leave, [NYNY] called the police, who issued trespass citations to the handbillers and escorted them off the premises." *New York New York*, 334 NLRB at 762.

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[2] With regard to NYNY's right to control the behavior of Ark employees while they are on hotel premises, § 8.9 of the lease agreement provides in pertinent part:

> "[Ark] hereby covenants and agrees that it shall . . . ensure that its . . . employees . . . shall abide by any reasonable rules and regulations as [NYNY] may, from time to time, reasonably adopt for the safety, care and cleanliness of the Premises, or the Hotel or for the preservation of good order thereon or to assure the operation of a first-class resort hotel facility. All such rules and regulations shall be enforced by [NYNY] uniformly and in a nondiscriminatory manner." GC 5, p. 17.

And, fourth, the additional three incidents, which occurred almost a year later and gave rise to the second unfair labor practice case, were:

> "On April 7, 1998, two off-duty Ark employees entered the casino and distributed handbills to customers in front of America, one of the Ark restaurants on [NYNY's] premises. That same day, two other off-duty Ark employees entered the casino and distributed handbills to customers in front of another Ark restaurant, Gonzalez y Gonzalez. On April 9, two off-duty Ark employees (one of whom had distributed on April 7 in front of America) went to the porte-cochere (the area just outside the main entrance to the casino), where they distributed handbills to customers as they entered the facility. The handbills bore an area standards message, stating that Ark paid its employees less than unionized workers and urging customers to tell Ark to sign a union contract. None of the handbillers physically restricted customers in entering or leaving the restaurants or the casino.
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> "In each instance, [NYNY's] managers informed the handbillers that they were trespassing on [NYNY's] property. When the handbillers refused to leave, [NYNY] called the police, who issued trespass citations to all but one of the handbillers and escorted them off the premises. The other handbiller was escorted from the premises by [NYNY's] security officers." *New York New York*, 334 NLRB at 772.

ARGUMENT

I. NATURE AND STRENGTH OF THE RESPECTIVE § 7 RIGHTS AND PRIVATE PROPERTY RIGHTS.

As we noted at the outset, and as the court of appeals recognized, it is plain that NYNY's action as property owner against employees who were exercising their § 7 right to self-organization at their workplace by distributing pro-union handbills in nonwork areas of the NYNY hotel complex would constitute an unfair labor practice if the employees in question were directly employed by NYNY. And, as we also noted, that conclusion reflects the proper "accommodation of § 7 rights and private property rights" based on an assessment of "the nature and strength of the respective § 7 rights and private property rights asserted in [the] given context." *Hudgens*, 424 U.S. at 522.

Against that background, we now show that "the nature and strength of the . . . § 7 rights" asserted by the employees in this case, who were directly employed by Ark, NYNY's food concessionaire operating throughout the hotel complex under a contract with the hotel, and "the nature and strength of the . . . private property rights asserted" by NYNY to justify its interference with the employees' § 7 protected activity are, in all material respects, identical to what they would have been in a case involving the same action by NYNY against food service employees employed directly by the hotel who engaged in the same § 7 activity. It follows that in this case the proper "accommodation of § 7 rights and private property rights" is that NYNY's actions prohibiting the Ark employees' exercise of their § 7 right of self-organization do constitute unfair labor practices, as twice previously found by the Board.

A. THE NATURE AND STRENGTH OF THE EMPLOYEES' § 7 RIGHTS.

The Ark employees' § 7 right to engage in workplace organizational activity by distributing pro-union handbills in the nonwork areas of the hotel complex is of the same nature and strength as that of NYNY's employees. In both instances, the employees are directly exercising their own § 7 right of self-organization at their own regular workplace. And, the Supreme Court has emphasized that such activity is to be accorded the highest degree of § 7 protection.

The Ark employees, first of all, were directly exercising their own § 7 rights by distributing handbills calling upon their employer to negotiate with their union and publicizing the fact that they and their fellow Ark employees were being paid beneath union rates. That employees are directly exercising their own § 7 right to self-organization is a "critical" consideration in assessing the nature and strength of their protected right, because it is "the [self-]organizing activities of employees (to whom § 7 guarantees the right of self-organization)" – as opposed to the organizing assistance activities of "nonemployees (to whom § 7 applies only derivatively)" – that stand on the highest rung of § 7 protection. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992). *See American Hospital Ass'n v. NLRB,* 499 U.S. 606, 609 (1991) ("The central purpose of the Act was to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations.").

What is more, the Ark employees were exercising their § 7 right of self-organization at their own workplace. In two instances, the employees were distributing

their flyers directly in front of restaurants operated by Ark within the NYNY hotel complex. And, in two other instances they were distributing their flyers at the public entrance to the NYNY hotel complex, which is served throughout by Ark's various food service operations. Thus, the Ark employees conducted their distribution at entrances that were near their workplaces and used both by the general public and by other off-duty Ark employees. This brings into play the Supreme Court's recognition that an employee's workplace "is a particularly appropriate place for the distribution of § 7 material." *Eastex*, 437 U.S. at 574.

To be sure, the General Counsel has suggested that the employees' self-organizational activity in this case is entitled to lesser § 7 protection because the handbills sought public support for their campaign to organize their own workplace. GC Br. on Remand 26. That suggestion is wrong. As the D.C. Circuit has observed, the Board has consistently held that "the fact that the off-duty employee distributions . . . were to customers rather than to other employees appears to be a distinction without a difference and is an irrelevant consideration." *Stanford Hospital v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003), quoting *Santa Fe Hotel & Casino*, 331 NLRB 723, 730 (2000). *See NCR Corp.*, 313 NLRB 574, 576 (1993) ("The right of employees to distribute union literature during nonworktime and in nonwork areas is not limited only to distribution to prospective union members. Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations.").

That the distinction between appeals to the public and appeals to fellow employees is irrelevant is amply demonstrated by the circumstances of this case. First of all, the content of the handbills – asserting that the Ark employees were underpaid and calling on the recipients of this message to encourage Ark to recognize their union – had significance for the employees' co-workers – who could easily have received the handbills while passing through the nonwork distribution areas – as well as for members of the general public. Indeed, the very act of appealing at the workplace for public support would itself have communicated to co-workers that a viable organizing campaign was underway. Moreover, the employer's place of business is a particularly appropriate place to appeal for public support, because the members of the public being addressed there are likely to have an immediate interest in the employer's affairs and will be able to immediately express their support for the employees' organizing efforts, if they are moved to do so.

In sum, the Ark employees were directly exercising their own core § 7 right of self-organization by appealing for support for their organizing campaign, and they were doing so at the place most appropriate for that activity, i.e., at the location where they are "regularly and exclusively" employed. *New York New York*, 334 NLRB at 769. It is for these reasons, as the Board has twice correctly recognized, that the "nature and strength of the . . . § 7 rights," *Hudgens*, 424 U.S. at 522, at issue here are equal to the "nature and strength" of the § 7 rights of employees employed directly by NYNY.

B. THE NATURE AND STRENGTH OF NYNY'S PROPERTY RIGHTS.

The Supreme Court has identified two aspects of an employer's property rights that should be weighed in determining whether the employer may prohibit particular § 7 protected activity on its property. The first is "an employer's right to keep strangers from entering on its property." *Eastex*, 437 U.S. at 571. The second is the employer's "management interest" in regulating employee activity on its property. *Id*. at 573. In neither regard are NYNY's property rights stronger with respect to the Ark employees than they are with respect to NYNY employees engaged in the same § 7 activity.

With regard to the first property interest, the Court has observed that "an employer's right to keep strangers from entering on its property" is *not* implicated "when the organizational activity was carried on by employees already rightfully on the employer's property." *Eastex*, 437 U.S. at 571-572 (quotation marks and citation omitted). The Ark employees were rightfully on the premises of the NYNY hotel and casino complex in exactly the same way as employees employed directly by NYNY. Not only were the Ark employees invited onto the hotel premises for the purpose of providing food services to hotel guests and employees while on duty, but they were expressly "permit[ted], even encourage[d], . . . to visit and patronize the casino and restaurants in the complex and to use routes open to the public, including through the Porte-Cochere, to enter or exit from the complex" while off duty. *New York New York*, 334 NLRB at 767. Thus, NYNY's "right to keep strangers from entering on its property," *Eastex*, 437 U.S. at 571, was not implicated at all.

That being so, NYNY relies principally on its "managerial interest" as justification for invoking its property rights to remove the Ark employees from the hotel complex. NYNY Br. on Remand 7-9. In this regard, NYNY argues that a critical distinction is that the hotel had the managerial right to regulate the conduct of NYNY employees whereas it lacked "the ability to regulate the conduct of the Ark employees" because they were "not NYNY employees" subject to the hotel's managerial control. *Id*. at 9.

That argument fails for the simple reason that, in fact, NYNY did have "the ability to regulate the conduct of the Ark employees." The Board has specifically found that Ark employees "are also subject to NY-NY's own 'policies' respecting such things as 'employee entrances, parking, drug testing, name tags [and] conduct at the hotel while off and on duty.'" *New York New York*, 334 NLRB at 767. Indeed, NYNY reserved the right to adopt "reasonable rules and regulations . . . for the preservation of good order [on hotel premises]" and to "enforce[]" those rules and regulations "uniformly and in a nondiscriminatory manner" against Ark employees. GC 5 § 8.9, p. 17. Thus, if the Ark employees were engaged in disruptive behavior, NYNY most certainly could have exercised managerial control over that "conduct" either directly through enforcement of its own rules or through the hotel's control over their employer. Pursuant to that reserved authority, NYNY would have been within its rights in ejecting the Ark employees from the hotel complex had they engaged in disruptive behavior.

The truth is, however, that NYNY has not so much as asserted that the employees were in fact engaged in disruptive behavior. In this regard, the Board specifically found

that "[n]one of the handbillers physically restricted customers in entering or leaving the restaurants or the casino." *New York New York*, 334 NLRB at 772. Ironically, the handbillers might well have opened themselves to a meritorious charge of disruptive behavior justifying their ejection from the hotel complex had they entered upon Ark's leasehold to handbill, because the areas inside the leasehold are almost certainly work areas.

In sum, NYNY has not shown that a proper accommodation of its property rights entitled the hotel to prohibit the food service employees' direct exercise of their § 7 right of self-organization at their "regular[] and exclusive[]" place of employment. *New York New York*, 334 NLRB at 769.

II. THE FACT THAT NYNY IS NOT THE DIRECT EMPLOYER OF THE EMPLOYEES IS IRRELEVANT.

As we have shown above, the balance of § 7 interests and property interests in this case is such as to require an accommodation protecting the Ark employees' right to publicize their organizing campaign in a nondisruptive manner at their NYNY-owned place of employment. Indeed, the balance is no different than it would have been had NYNY taken the more usual approach of directly hiring the food service employees who work in its hotel. The only remaining question, therefore, is whether NYNY has a statutory privilege to interfere with the exercise of § 7 rights by employees who are not directly employed by the hotel.

That NYNY "was not the employer of the employees involved in this case" does not privilege the hotel to commit an unfair labor practice by interfering with the

employees' exercise of their § 7 rights for the simple reason that it is "undisputed that [the hotel] was an employer engaged in commerce within the meaning of §§ 2 (6) and (7) of the Act" and "a statutory 'employer' may violate § 8(a)(1) with respect to employees other than his own." *Hudgens*, 424 U.S. at 510 n. 3. Thus, NYNY could no more prohibit the Ark employees from publicizing their organizing campaign at locations near to but just outside of the Ark leasehold facilities within the hotel complex than NYNY could direct Ark to prohibit such activity inside the Ark facilities. *Fabric Services*, 190 NLRB 540, 541-542 (1971).

In *Fabric Services*, 190 NLRB at 541, the Board squarely rejected the argument that an employer "cannot, as a matter of law, be found to have violated Section 8(a)(1) of the Act by its action toward" an employee of a different employer. The Board rejected this defense on the ground that there is "no basis, either in the declared policy of the Act or in any delineating provision of it for construing Section 8(a)(1) as safeguarding employees in the exercise of the Section 7 rights only from infringement at the hands of their own employer." *Ibid.* "To the contrary," the Board found that "the specific language of the Act clearly manifests a legislative purpose to extend the statutory protection of Section 8(a)(1) beyond the immediate employer-employee relationship." *Id*. at 541-542.[3]

[3] The General Counsel has suggested that the result in *Fabric Services* "would have been different if the repairman had been attempting to organize the property owner's own employees." GC Remand Br. 18. But the relevant point in those circumstances would be whether the repairman in so doing would be directly protected by § 7 because he was engaged in self-organization or only "derivatively" protected

III. THE ANSWERS TO THE QUESTIONS POSED BY THE COURT OF APPEALS.

In remanding these cases to the Board, the D.C. Circuit posed the following questions, which the Board has reiterated in its announcement of oral argument and call for amicus briefs:

> "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)?" *New York New York*, 313 F.3d at 590.

As the court of appeals suggested, the answers to the first three questions follow directly from the "principles . . . derive[d] from the Supreme Court's decisions" set forth in the preceding two sections of this argument. *Ibid*. Under the principles established by the Supreme Court's decisions, "the fact that the Ark employees work on NYNY's premises" for an employer who operates from various locations within the hotel complex

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because he was assisting "the property owner's own employees" in their organizing effort. *Lechmere*, 502 U.S. at 532. No one has suggested that the Ark employees were engaged in anything other than self-organization.

to provide continuous services throughout the hotel and casino means that the Ark employees possess the same "*Republic Aviation* rights throughout all of the non-work areas of the hotel and casino" as employees directly employed by NYNY.

The answers to the other two questions are settled by established NLRB precedents. Since the Ark employees possess the same *Republic Aviation* rights as similarly situated NYNY employees, they had a protected right to "return[] to NYNY after their shifts had ended" in order to publicize their labor dispute "to guests and customers of NYNY (and possibly customers of Ark)" under the Board precedents discussed by the D.C. Circuit in *Stanford Hospital*, 325 F.3d at 343.

CONCLUSION

The Board should reaffirm its findings that NYNY committed unfair labor practices by prohibiting Ark employees from engaging in protected handbilling from locations near Ark operations within the hotel complex and at the general entrance to the hotel.

Respectfully submitted,

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REQUEST TO PARTICIPATE IN ORAL ARGUMENT

The American Federation of Labor and Congress of Industrial Organizations and the AFL-CIO Building and Construction Trades Department request to participate in the oral argument in these cases.

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CERTIFICATE OF SERVICE

I hereby certify that, on October 1, 2007, one copy of the foregoing Brief, *Amici Curiae*, of the American Federation of Labor and Congress of Industrial Organizations and the AFL-CIO Building and Construction Trades Department and Request to Participate in Oral Argument was served via overnight delivery service on counsel of record for the parties as follows:

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